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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. **77-740**

GULF OIL CORPORATION, ET AL.,
Petitioners,

v.

PAUL J. BOGOSIAN,
Respondent.

GULF OIL CORPORATION, ET AL.,
Petitioners,

v.

LOUIS J. PARISI,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI
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 The undersigned petitioners pray that a writ of certiorari issue to review the judgment and opinion of a divided panel of the United States Court of Appeals for the Third Circuit, entered on July 21, 1977.

OPINIONS BELOW

The opinion of the court of appeals is reported at 561 F.2d 434 and is set forth in the Appendix at pages A. 1-54. The order denying petitioners' motion for rehearing and suggestion for rehearing in banc is

set forth in the Appendix at page A-56.¹ The two relevant opinions of the United States District Court for the Eastern District of Pennsylvania are reported at 62 F.R.D. 124 (1973) (class action certification) and 393 F. Supp. 1046 (1975) (summary judgment) and are set forth in the Appendix at pages A. 57-73, 76-102.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 21, 1977. A timely petition for rehearing in banc was denied on August 25, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The decision below epitomizes and significantly fosters a trend that is producing a critical breakdown in the administration of justice: the conversion of grievances (real or imagined) between two parties, however miniscule, into massive industrywide and nationwide litigation which clogs the courts and imposes astronomical litigation burdens upon the parties. Although the Federal Rules of Civil Procedure call for "the just, speedy and inexpensive determination of every action" (Rule 1) and afford procedures that might enable district courts to meet this challenge (*e.g.*, Rules 12 and 56), the panel majority dictates a procedure which is accurately described by the dissent as "jurisprudential anarchy" (A. 43).

¹ The suggestion for rehearing in banc was considered only by the three members of the panel since all of the other judges of the court of appeals had recused themselves from participating in this case (see p. 9, *infra*).

The two plaintiffs purport to have a tie-in claim involving the leasing of a service station and the securing of a supply of the lessor's brand of gasoline for resale. Rather than having the individual claims promptly resolved, the two judge majority of the court of appeals has determined to allow plaintiffs' counsel to convert them into a mammoth proceeding against strangers to the plaintiffs that by its very magnitude would seriously impair proper functioning of the court system and would impose such enormously unfair and coercive burdens upon defendants as to deprive them of elementary justice.

The questions which warrant urgent review by this Court are:

(1) Whether the action of the court of appeals violates the Federal Rules of Civil Procedure and defendants' due process rights by depriving the district court of the power to determine that complaints, which as a matter of "deliberately employed strategy" alleged no concerted action, but only interdependent consciously parallel action, state a claim for relief under Section 1 of the Sherman Act.

(2) Whether the panel majority, in conflict with the established law of the Third Circuit and other courts of appeals, erroneously substituted its findings, based on unfounded factual assumptions and legal conclusions, for the discretionary class certification determinations of the district court.

(3) Whether the panel majority, in reversing the class determination ruling, erred in concluding that a purchaser may recover antitrust damages for an alleged illegal tying arrangement where he voluntarily obtained both the alleged tying and tied products.

STATUTES AND RULES INVOLVED

The statute involved is 15 U.S.C. § 1, which reads in pertinent part as follows:

Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal

The case also involves the proper interpretation of Rules 1, 12, 23 and 56 of the Federal Rules of Civil Procedure, the texts of which are set forth in the Appendix at A. 132-38.

STATEMENT OF THE CASE

The original *Bogosian* complaint was filed over six years ago in May, 1971, on behalf of a lessee service station dealer of Gulf Oil Corporation. That complaint alleged that the defendants had a monopoly of "strategically located service station sites" in metropolitan areas and used this monopoly to control virtually all aspects of the operations of independent retail service station dealers.² The plaintiff purported to represent a nationwide class of all past, present and future retail dealers who leased service stations from any of the defendants. The complaint, however, did not allege that *Bogosian* had any business dealings with any defendant other than Gulf or that any defendant had engaged in any conspiratorial or concerted action which affected the plaintiff. After *Bogosian* had confirmed at his deposition that his claims were based solely on his relationship with Gulf, the non-Gulf defendants moved for summary judgment.

² The original *Bogosian* complaint is set forth in the Appendix, at A. 124-31.

Acknowledging that he had set forth no basis for suing the non-Gulf defendants, plaintiffs' counsel met the summary judgment motion with a two-fold procedural response. First, he moved to amend the *Bogosian* complaint to allege that "defendants have conspired among themselves and with others . . . through a course of interdependent conscious parallel action pursuant to a tacit understanding by acquiescence coupled with assistance . . ." (A. 117-18).³ Second, *Bogosian's* counsel filed the *Parisi* complaint on behalf of Mr. Parisi, a former lessee dealer of Exxon Corporation. That complaint named the original *Bogosian* defendants as well as two additional companies; asserted the same alleged monopoly and anti-competitive activities; purported to encompass the same class; and included the same vague "conspiracy" allegation as the amended *Bogosian* complaint.

On January 13, 1972, the district court, while noting that "conspiracy allegations were conspicuously lacking from the original complaint" and that the omission of "such important allegations" was "curious," raising the "suspicion that the omission was by design and not by inadvertence," granted *Bogosian's* motion for leave to amend and therefore denied defendants' motion for summary judgment without prejudice as moot (A. 103-05).

The parties then engaged in extensive discovery and briefing on the propriety of these cases proceeding as class actions. During the course of the initial hearing on the class motion in January, 1973, plaintiffs' counsel, recognizing the futility of seeking class certification on their original claims, substantially modified them. They abandoned their prior claims, including the alleged monopoly of service station sites, and stated their intention to proceed on the allegation that defendants entered into tying arrangements with their dealers by requiring each

³ The first amended *Bogosian* complaint is set forth at A. 113-23.

dealer who leased a service station to purchase gasoline exclusively from the lessor.

On March 30, 1973, the district court again granted plaintiffs leave to file new amended complaints setting forth their new theory of liability. On May 2, 1973, two years after the beginning of this litigation, the third version of the claims was filed.⁴ In addition to abandoning many of the plaintiffs' previous allegations of monopoly and other purported anticompetitive practices, the new complaints deleted the conspiracy allegations which had appeared in the *Bogosian* first amended complaint and the original *Parisi* complaint. That is, the new complaints deleted the previous allegation of "conspiracy" and "tacit understanding" among defendants, and did not allege any concerted activity, but only that:

Defendants, through a *course of interdependent consciously parallel action*, have required all dealers who lease, sublease, or renew such leases or subleases for one or more defendants' service stations to:

- (a) license the use of the lessor's trademark;
- (b) sell only the lessor's gasoline; and
- (c) not sell gasoline purchased from any other source under the licensed trademark (A. 109; emphasis added).

The District Court Opinions

After further briefing and a second hearing, the district court, on December 19, 1973, denied plaintiffs' motion to certify the alleged nationwide class (A. 76-102). The court set forth the background and scope of this litigation, thoroughly analyzed plaintiffs' efforts to secure class action treatment and, based on the record which consisted of extensive affidavits, interrogatory answers

⁴ The second amended *Bogosian* complaint is set forth at A. 106-11.

and deposition testimony, carefully considered the facts and demonstrated that class treatment was wholly inappropriate in these cases for numerous independently sufficient reasons. The district court expressly considered and rejected each of three possible bases for class treatment under Rule 23(b), applying the proper legal standards set forth in the Rule to the facts of these cases. The court catalogued the issues raised by plaintiffs' claims and analyzed why those issues were not susceptible of common treatment, concluding that individual questions with respect to both liability and damages predominated over common issues and that processing these cases as class actions would give rise to staggering problems of manageability (A. 76-102).

Subsequently, those defendants which had no business dealings with the plaintiffs again moved for summary judgment based on the second amended complaint's failure to allege any agreement or concerted action. The district court, noting that the deletion of the conspiracy allegations from the second amended complaint was "a matter of deliberately employed strategy" by plaintiffs' "experienced and learned attorneys in the field of anti-trust litigation" (A. 59), dismissed the claims against the non-lessor defendants (A. 57-75).⁵ The court's decision was based on the controlling decisions of this Court, the Third Circuit and other courts of appeals that conscious parallelism (whether or not interdependent) does not alone constitute a violation of Section 1 of the Sherman Act, and, therefore, a complaint which alleged no more than conscious parallelism does not state a Section 1 claim.

⁵ The district court permitted the actions to proceed against those companies from which the plaintiffs had leased service stations, i.e., Gulf in the *Bogosian* case and Exxon in *Parisi* (A. 68-73, 75).

The Court of Appeals Proceedings

In an opinion dated July 21, 1977, a divided panel of the Third Circuit (Seltz, Ch. J., and Gibbons, J.; Aldisert, J., dissenting) reversed both the denial of class certification and the decision on the sufficiency of the amended complaints (A. 1-54). The majority held that no determination of the legal sufficiency of pleadings could be made until after subjecting the trial court and the parties to lengthy discovery. Moreover, the court resuscitated the claims against petitioners while recognizing that disposition of the pending claims against the lessor defendants would render moot the claims against the non-lessors (A. 11-12).

To compound the unfairness of such a procedure, the court reversed the district court's rejection of the proposed class. The panel majority, in contravention of the in banc decisions of the Third Circuit and the decisions of several other circuits, substituted its judgment for the discretionary determinations of the district court. Thus, the court suggested that hundreds of thousands of present and former dealers throughout the country be brought into this action despite acknowledging the questionable legal sufficiency of the complaints. In so doing, the majority swept aside the insuperable problems of judicial manageability which had led the district court to deny certification and prejudged many of the complex issues raised by plaintiffs' claims—based on wholly unfounded factual assumptions. Moreover, the panel's class determination is based on an interpretation of the substantive law of tying arrangements contrary to the governing authorities of this Court, the Third Circuit and other courts of appeals by treating a buyer as having a tie-in claim even if he wished to buy both the alleged tying and tied products and was not forced to buy anything he did not want.

In light of the enormous impact of the panel majority opinion on both substantive antitrust law and the proper judicial administration of massive class action litigation and the conflicts between the majority opinion and decisions of this Court, the Third Circuit and other courts of appeals, petitioners herein moved for in banc consideration. However, because all of the active judges of the Third Circuit other than the panel had disqualified themselves from considering this matter, in banc consideration was impossible and petitioners' motion was denied by a 2 to 1 vote of the same panel which rendered the decision below (A. 56, 139).^{*}

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision on the Sufficiency of the Complaints Is Contrary to Decisions of this Court and the Courts of Appeals and Leaves Uncertain the Legality of Many Types of Legitimate Business Conduct

The decision below severely jeopardizes the administration of justice in the federal courts and creates far reaching uncertainty with respect to fundamental principles of antitrust law and legitimate business conduct. Since the customary remedy of in banc consideration by the Third Circuit was unavailable in the instant case, review by this Court is necessary to resolve the conflicts between the decision below and the principles established in prior decisions of this Court, the Third Circuit and several other circuits and, in the exercise of this Court's supervisory responsibility over the administration of jus-

^{*} The recusal of the remaining circuit judges is noted on the Third Circuit's docket sheet (a copy of which is reproduced at A. 139). The reasons for this wholesale recusal are not disclosed, but presumably at least some members of the court were required to disqualify themselves under the rigid financial interest restraints imposed by 28 U.S.C. § 455.

tice in federal courts, to establish standards for the prompt resolution of legal issues in complex litigation.

A. Deferral of Decision on the Legal Sufficiency of Plaintiffs' Theory Until After Discovery and Trial Is Contrary to the Controlling Authorities and Will Result in "Jurisprudential Anarchy"

The essential holding of the court of appeals is that the district court erred in determining the sufficiency of the second amended complaints, and that the court should have deferred ruling on the sufficiency of the conscious parallelism claims:

We conclude that the ruling that the specific allegation of interdependent consciously parallel action made here fails to state a claim should be vacated so that the issue can be decided, if necessary, after the relevant facts are fully developed (A. 22).

Alternatively, the majority held that the mere inclusion of the term "combination" in the complaint satisfied the liberal rules of pleading (A. 18-19). However, since the only acts alleged to constitute the "combination" were the allegedly parallel leasing practices of the defendants⁷ and since the court deferred ruling on the issue of whether an allegation of such parallel conduct

⁷ Paragraph 16 of the second amended complaint alleges:

The unlawful acts of defendants *as aforesaid* constitute an unreasonable combination in restraint of interstate trade and commerce in the marketing of gasoline in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (A. 110; emphasis supplied).

Paragraph 16 explicitly states that the combination therein alleged consists solely of "the unlawful acts of defendants *as aforesaid*." But the only "aforesaid" unlawful acts are the alleged similar, or parallel, leasing practices of the defendants. Thus, the totality of the alleged combination is the defendants' alleged "interdependent consciously parallel action," and the mere inclusion in Paragraph 16 of the statutory word "combination" does not add the crucial element of agreement necessary for a Sherman Act claim (see pp. 14-17, *infra*).

is sufficient to state a Sherman Act claim, the effect of the alternative holding is merely to defer resolution of the legal sufficiency of the complaint allegations pending discovery and, perhaps, trial.

The panel majority thus held that the *legal* sufficiency of the charges in a case involving alleged classes of hundreds of thousands of dealers of 15 oil companies cannot be decided after some six years of litigation (including two amended complaints), but must await many more years of time consuming and expensive discovery and trial proceedings. The issue here is not whether the plaintiffs can muster the evidence to prove a Section 1 violation, but whether their complaints state a cause of action. Requiring the district court to defer decision on the legal sufficiency of a complaint until after extensive undefined discovery is contrary to the scheme of the Federal Rules of Civil Procedure, misinterprets the controlling decisions of this Court and conflicts with the decisions of other circuits. Moreover, the approach adopted by the court of appeals would hamstring the effective judicial management of complex litigation by eliminating the availability of summary determination of questions of law. Finally, and most significantly, requiring parties against whom no cause of action is asserted to disclose their private files and to endure years of onerous litigation burdens would be a violation of fundamental constitutional rights.

The dissent summarizes the adverse effects of the majority approach on judicial administration as "jurisprudential anarchy":

Although the majority purports to act in the interest of efficient judicial administration, I fail to see how that interest is served by allowing what probably will be massive discovery prior to deciding whether the basic theory of the action is legally viable. The relevant facts should be fully developed after it is

determined whether the claim is legally sufficient, not while that issue is still in doubt. Moreover, until the theory of the case is settled, it will not be known which are the 'relevant' facts. Facts are only relevant insofar as they support a valid legal theory (A. 43).

The Federal Rules of Civil Procedure contemplate that a case be dismissed when the complaint does not set forth a legal theory which would support recovery if all of the alleged facts were proved. See Federal Rules of Civil Procedure 12(b)(6) and 56; *see generally* 2A Moore, Federal Practice ¶ 12.08. Use of these provisions enables the federal judicial system to function by eliminating claims which are insufficient as a matter of law without costly and time-consuming pretrial and trial proceedings. Again, the dissent emphasizes the need for effective use of these devices:

A motion to dismiss or for summary judgment for failure to state a claim seeks to obviate the necessity for time-consuming and expensive discovery in cases where the facts are irrelevant because no legal claim has been stated. Requiring discovery as a predicate to deciding such a motion defeats the very purpose of the motion. . . . The question is whether an allegation of interdependent consciously parallel action states a Sherman Act claim. Either it does or it does not. That may be a sophisticated question, but it is a question of policy, not of fact (A. 43).

In requiring deferral of decision on the legal sufficiency of the complaint until the conclusion of discovery, the panel majority misapplied this Court's ruling in *Conley v. Gibson*, 355 U.S. 41 (1957). *Conley* held that the Federal Rules require only a short plain statement of the claim and that all supportive facts need not be pleaded, but did not abolish the requirement that a com-

plaint state a legally cognizable cause of action.⁸ The entire question here is whether a legally sufficient claim has been stated, and the panel majority in effect establishes a new rule for judging the sufficiency of pleadings in complex cases, *i.e.*, that such judgments must be deferred until after full development of the facts through discovery.

This is not a case in which the district court granted summary judgment despite the existence of factual issues or where the evidence to support the claim was in the possession of the defendant. Rather, the district court granted judgment because the sufficiency of the second amended complaint was purely a question of law. In holding this action improper, the panel majority acted in direct conflict with the decisions of other circuits, which hold that such questions, no matter how difficult, should be decided on motion. *See e.g.*, *Schwartz v. Campagnie General Transatlantique*, 405 F.2d 270, 273-74 (2d Cir. 1968) ("Where appropriate, a trial judge may dismiss for failure to state a cause of action upon motion for summary judgment Summary judgment procedure may be properly invoked for determination of a legal question"); *Morr v. United States*, 243 F.2d 913, 914 (6th Cir. 1957) ("Even if the issue involved proves to be a difficult one . . . it is nevertheless a purely legal one, not factual, and summary judgment is proper"); *Archer v. United States*, 217 F.2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955).

The instant case demonstrates the need for summary procedures and the adverse effect of the approach espoused by the court of appeals on the administration of justice and the rights of the defendants. Six years have elapsed since suit was instituted. The complaint

⁸ To the contrary, *Conley* is based on the finding that "[w]e have no doubt that [the] complaint adequately set[s] forth a claim" (355 U.S. at 48).

has been twice amended; motions have been extensively briefed and argued—all of which has burdened judicial resources and diverted the trial court from more pressing needs. Now the panel majority has dictated that a decision on the legal sufficiency of plaintiffs' complaint must await what will inevitably be several more years of expensive and time-consuming discovery, with attendant motions and judicial supervision. And, of course, at the conclusion of this process, plaintiffs' complaint will have no more or less *legal* validity than now.

The courts and commentators have become increasingly critical of the intolerable burdens on the judiciary imposed by the approach adopted by the panel majority, which Chief Judge Markey, citing the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, described as the "unhappy marriage of 'notice' pleading and virtually unlimited discovery." *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1086 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (concurring opinion). Efficient judicial administration particularly requires the availability of summary procedures to dispose of untenable claims in complex litigation. See Withrow and Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 Cornell L. Rev. 1, 34 (1976); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 79, 199-211 (1976).

B. The Controlling Decisions of this Court and the Courts of Appeals Establish that Interdependent Conscious Parallelism does not Constitute a Violation of the Sherman Act

Since Section 1 of the Sherman Act requires a "contract, combination, or conspiracy in restraint of trade," some form of agreement or concerted action by a plurality of actors is necessary. Therefore, this Court and

others have consistently held that proof of consciously parallel conduct does not alone amount to a Section 1 offense. See *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954); *Naumkeag Theatres Co. v. New England Theatres, Inc.*, 345 F.2d 910, 911 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963); *Winchester Theatre Co. v. Paramount Film Distributing Corp.*, 324 F.2d 652, 653 (1st Cir. 1963); *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

If proof of agreement is necessary to establish a Section 1 violation, *a fortiori*, an allegation of agreement is necessary to state a cause of action. In the face of overwhelming precedent and plaintiffs' intentional elimination of any allegation of agreement among the defendants, the panel majority held that the allegations of interdependent consciously parallel action may state a Section 1 claim.⁹

Both the reason for the prevailing rule that consciously parallel behavior (whether or not interdependent) does not constitute a violation, and the serious consequences of the panel majority's departure from these settled principles, are obvious. Virtually all business decisions are based to some extent on prior actions or anticipated reactions of competitors. Vigorous competition often results in similar actions by competitors, and the mere fact that several businessmen individually react in a similar manner to a common stimulus does not amount

⁹ The inclusion of the term "interdependent" in the complaints does not distinguish this case from the controlling decisions. As explained by the dissent, the insertion adds nothing because "interdependence is implicit in the notion of conscious parallelism and . . . the added word is hardly more than a redundancy" (A. 47).

to a combination or agreement for Sherman Act purposes. See, e.g., *Orbo Theatre Corp. v. Lowe's, Inc.*, 156 F. Supp. 770, 775 (D.D.C. 1957), *aff'd per curiam*, 261 F.2d 380 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 943 (1959). As the dissent points out, such consciously parallel business behavior may be the essence of competition:

In the usual situation of parallel business behavior, a businessman is conscious of what his competitor is doing and his action, or inaction, depends on what the competitor does. This is not a violation of the antitrust laws; it is, in fact, the essence of the competitive behavior that those laws seek to promote (A. 47).

Indeed, in the instant case, the allegedly consciously parallel conduct is no more than similar, but not identical, efforts by the defendants to police the use of their registered trademarks as required by the Lanham Act, 15 U.S.C. §§ 1055 *et seq.*, the Federal Trade Commission Act, 15 U.S.C. §§ 41, *et seq.* and insure compliance with over 25 state statutes prohibiting the misbranding and false labelling of gasoline at retail outlets.¹⁰ Under the court of appeals' formulation, defendants' refusal to at-

¹⁰ This Court has long recognized as a fundamental proposition of trademark law:

If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin.

FTC v. Royal Milling Co., 288 U.S. 212, 216 (1933).

With respect to the Federal Trade Commission Act, the courts have long recognized the obligation of a trademark owner to control the use of his mark:

The pertinent principles of law are clear. The owner of a trademark or tradename may not use, nor permit the use of,

tempt to induce their competitors' customers to breach their contracts with their suppliers and to violate federal and state law could subject them to criminal antitrust sanctions.

Unfortunately, because of the wholesale recusal of the other circuit judges, the customary remedy of *in banc* review was not available to correct the conflicts between the panel decision and the controlling authorities. See *Windham v. American Brands, Inc.*, 1977-2 Trade Cas. (CCH) ¶ 61,670 (4th Cir. October 11, 1977) (*in banc*) (see discussion at pp. 23-24, *infra*). Therefore, the need for review by this Court is all the more compelling in the instant case.

II. Review of the Panel Majority's Class Determination is Required to Establish Standards for the Efficient Judicial Administration of Class Actions and to Resolve Conflicts Among the Circuits

Having stripped the district court of the ability to dismiss those defendants against whom no claim is stated, thereby subjecting them and the district court to many more years of burdensome and expensive proceedings, the court of appeals proceeded to expand the case many times over by reversing the district court's careful and fully supported class action determinations.

such trademark or tradename in a manner designed to deceive the public. Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act.

Waltham Watch Company v. FTC, 318 F.2d 28, 31-32 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963); see also *FTC v. Sinclair Refining Co.*, 261 U.S. 463 (1923); *Redd v. Shell Oil Co.*, 524 F.2d 1054 (10th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); *Blue Bell Co. v. Frontier Refining Co.*, 213 F.2d 354 (10th Cir. 1954).

A. The Court of Appeals' Decision Constitute a Wholly Unauthorized Invasion of the District Court's Discretion to Supervise Class Action Litigation

Several courts of appeals, including prior in banc decisions of the Third Circuit, have recognized the need for deferring to the discretion of the district court on class action determinations. In *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974), the Third Circuit in banc limited review on the issue of predominance of common questions to whether the district court properly identified the issues raised by the claims and those issues which are common to the class members. Once the district court has done so, the court of appeals must defer since the issue of predominance "relates to the conservation of litigation effort, and the trial court's judgment probably will be as good as ours" (496 F.2d at 756). With respect to the superiority of the proposed action, *Katz* required deference to the district court's discretion so long as the court had considered and compared the fairness and efficiency of the alternative methods of adjudicating the controversy (*Id.*, at 759).¹¹ In *Link v. Mercedes-Benz of North America, Inc.*, 550 F.2d 860 (3d Cir.), *cert. denied*, 97 S.Ct. 2641 (1977), the Third Circuit in banc reaffirmed *Katz*, noting that the trial judge as "the man on the scene" is far better equipped to evaluate the practical problems posed by massive class actions (550 F.2d at 864).

The principles established in *Katz* and *Link* have been adopted by several other circuits. See *New York v. International Pipe and Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969) (judgment of trial court to be given

¹¹ The impact of the wholesale recusal of the Third Circuit judges in this case is demonstrated by the fact that four of the five judges who recused themselves were part of the *Katz* majority. The fifth, Judge Adams, went further and argued in his dissent that the majority did not pay sufficient deference to the trial courts' "generous discretion" (496 F.2d at 775).

"broadest discretion" and "greatest respect"); *Shumate & Co. v. NASD*, 509 F.2d 147, 155 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975) ("District Court's decision is reviewable only for an abuse of discretion"); *Livesay v. Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1110 (8th Cir. 1977) (district court decision "reviewable only for an abuse of discretion"); *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974) ("class action determination under Fed. R. Civ. P. 23 is one of a trial courts' considered discretion"); *Peterson v. Oklahoma City Housing Authority*, 545 F.2d 1270 (10th Cir. 1976) ("question . . . is one primarily for the determination of the trial judge").

The de novo class determination by the panel majority here is directly contrary to these cases. As noted by the dissent, the majority's citation of purportedly common issues is merely "a euphemistic way" of disagreeing with the district court's structuring of the proof—a matter which "lies necessarily and unalterably within the discretion of the district court" (A. 50). For example, while recognizing that the contracts in issue do not, on their face, require the exclusive sale of the lessor's gasoline, the majority identifies as common the issue of whether the "practical economic effect" of the lease provisions utilized by the defendants, when read together, amount to the alleged tie-in (A. 32-33). Based on factual assumptions which were totally unsupported by the record, the majority suggests the "practical economic effect" can be shown on a uniform basis for each of the hundreds of thousands of present and former dealers of the fifteen defendants. This finding overlooks numerous complex individual issues which led the district court to reject the proposed class, including:

(1) The significant variations among the over 400 forms of leases and contracts utilized by the defendants, which are subject to further negotiations with individual

dealers. The majority describes allegedly common lease provisions which presumably give rise to the "practical economic effect" (A. 32). However, many of the provisions are not common to the leases utilized by the defendants, and such significant variations led the district court to find that analysis of the economic effect of defendants' varied contracts would raise individual issues (A. 95);

(2) The location of the station and its sales volume, which have a direct impact on the "practical economic effect" of lease provisions on the individual dealers; and

(3) The interest of the individual dealers in purchasing from a source other than his lessor.

The dissent succinctly summarizes the error of the majority's assumptions:

Even if there were only one defendant oil company and only one form contract, the practical economic effect would vary from dealer to dealer, city to city, region to region. It might, for example, be economically feasible for a large volume dealer in a large city to install his own pumps and tanks while it might not be feasible for a smaller dealer in a smaller city to do so. Here there are more than a dozen oil companies, with operations concentrated in different regions of the country, and there are more than 400 different forms of contracts and agreements. *A fortiori*, the practical economic effects of the agreements will present diverse questions (A. 50-51).

Similarly, the panel majority reversed the district court's finding that proof of sufficient economic power over the tying product, i.e., service station sites available for lease, would require an individual determination by location, or at least by geographic market. The court of appeals relied on the assumptions that defendants control a majority of the existing service stations and that zoning restrictions and high capital costs re-

strict new development (A. 35-36). This unprecedented intrusion into the fact-finding province of the district court is unsupported by the record and defies common sense by ignoring the significant variations in zoning restrictions, capital costs and defendants' market shares among the thousand of diverse markets encompassed within the alleged nationwide class. Obviously, whatever the situation may be elsewhere, if there were other stations (or sites suitable for station use) available to a dealer in his area, his decision to lease from a defendant does not give him an antitrust claim. *See Northern Pacific R. Co. v. United States*, 356 U.S. 1, 7 (1958).

With respect to the issues of the fact and amount of damages, the panel majority speculates that damages ultimately might be proved by calculating a per unit overcharge resulting from the alleged practices as in a horizontal price fixing case brought by consumers (A. 38-40). This finding ignores the requirement that a purchaser seeking damages for an alleged tie-in must show that he was forced to purchase a product at a price higher than he otherwise would have paid for a comparable product in order to demonstrate impact or fact of damage. *See Gray v. Shell Oil Co.*, 469 F.2d 742, 751 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1975); *see generally Areeda, Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127 (1976). The court's damage formulation also ignores the necessity of setting off against the alleged overcharge the value of the use of the defendants' trademarks and other services provided. *See United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 618 (1977); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Ungar v. Dunkin' Donuts of America, Inc.*, *supra*, 531 F.2d 1211, 1223 (3d Cir.), *cert. denied*, 429 U.S. 823 (1973). These calculations will vary by brand, geographic area and

individual dealer, and could far exceed any overcharge, thereby resulting in no impact or fact of damage. See *United States Steel Corp. v. Fortner Enterprises, Inc.*, *supra*; Areeda, *Antitrust Analysis* ¶ 554 at 617 (2d ed. 1974).

Finally, with respect to the issue of superiority of the class action device and the peculiarly discretionary issue of manageability of the proposed class action, the majority summarily disregards the district court's detailed analysis of both the relative fairness and efficiency of alternative methods of adjudication and the criteria set forth in Rule 23(b)(3) (A. 90-102), and states only that it disagrees completely with each of the district court's findings (A. 40-41). The court noted only that problems of notifying class members could be overcome by use of defendants' regular mailings to their dealers—a procedure which would violate due process and which was suggested by Justice Douglas in his dissent in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 180 n.1 (1974), but rejected by the *Eisen* Court.

Although, as noted above, several courts of appeals, including prior in banc decisions of the Third Circuit, recognize the need for deferring to the discretion of the district court on these questions, the instant case demonstrates the need for a definitive ruling by this Court to establish guidelines for the proper administration of class actions. See *Recent Developments*, 62 Cornell L. Rev. 177, 184 (1977). Moreover, review by this Court is compelled in the instant case because the recusal of all of the remaining circuit judges effectively eliminated petitioners' right to seek reconciliation of the panel majority's opinion with the controlling precedent. See generally, *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 261 (1953).

The experience of the Fourth Circuit illustrates the need for review of the instant case. In *Windham v.*

American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976), the panel majority as here substituted its findings for the district court's and reversed a denial of class certification. As here, the court relied in part on its finding that a bifurcated trial on the issues of liability and damages would be appropriate.¹²

Unlike the instant case, the remedy of rehearing in banc was available to reestablish the necessary discretion of the district court. In *Windham v. American Brands, Inc.*, 1977-2 Trade Cas. (CCH) ¶ 61,670 (4th Cir., Oct. 11, 1977) (in banc), the full court noted that the district court's denial of class treatment was based on a finding of unmanageability and recognized:

the firmly established principle that the issue of manageability of a proposed class action is always a matter of 'justifiable and serious' concern for the trial court and peculiarly within its discretion. This is so because the issue is one of fact, subject to determination by the district court; it is 'a practical problem, and primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals. Consequently, it is an area in which the trial court must of necessity be granted a wide range of discretion.' (quoting *Link v. Mercedes-Benz, supra*). (*Id.* at 72,748; footnotes omitted.)

With these principles in mind, a 7 to 1 majority of the in banc court reversed the panel decision, emphasizing that it would not disturb the trial court's findings (similar to those of the district court here) that the individual issues raised by the necessity of proving the three elements of an antitrust cause of action made the action unmanageable. The court specifically rejected the panel's

¹² The court below relied on the panel decision in *Windham* in suggesting such a procedure (A. 39).

directive to bifurcate the trial of the issue of violation from impact and damages, noting that although the *Bogosian* majority had approved such a technique, "[t]he reasoning in Judge Aldisert's dissenting opinion [is] more persuasive." (*Id.* at 72,752, n. 35a).

Here, as in *Windham*, the panel majority exceeded the proper role in the administration of class actions and trampled on the broad discretion which must be afforded the district court, establishing principles in conflict with those of the other circuits. However, in *Windham* in banc review by the Court of Appeals was available to reestablish the proper rule of law. The wholesale recusal of the Third Circuit judges eliminates such a remedy here and requires review by this Court.

B. The Panel Majority's Class Determination is Based on Substantive Antitrust Principles Which Are Contrary to Decisions of this Court and the Courts of Appeals

The district court held that proof of plaintiffs' tie-in claims "would require a factual determination in each and every lease that there was such economic coercion as to constitute an illegal tie-in arrangement" (A. 95). Because such a determination would require an individual inquiry with respect to each class member, the court found class action treatment inappropriate.

The panel's reversal is based on principles of the substantive law of tying arrangements directly contrary to the prior decisions of this Court, the Third Circuit and several other court of appeals. First, both the district court and the court of appeals recognized that the multiple contracts utilized by the defendants did *not* contain any express requirement that lessee dealers purchase gasoline exclusively from their lessors (A. 32, 94). However, the court of appeals proceeded to analyze the prob-

lems of proof raised by plaintiffs' claims as if the contracts in question did contain express tie-in clauses.

Second, the panel majority held that no proof of coercion is necessary to sustain a tie-in claim by a purchaser where there is a written contract, the alleged practical effect of which is to induce the purchase of both the alleged tying and tied products (A. 33).

While correctly noting that the essence of an unlawful tie-in is a seller who conditions the sale of one product on the purchase of another, the panel majority failed to recognize that in a damage action brought by a purchaser (as opposed to a competitor or a government prosecution) proof of such "conditioning" necessarily requires a showing that the buyer did not willingly seek to purchase both products, but was required to purchase the tied product as a condition to obtaining the tying product. Thus, the effect of the courts' ruling is to convert any contract, or in this case two contracts,¹³ providing for the sale of two or more products into a Sherman Act violation.

This Court has recognized that the essence of an unlawful tie-in is the use by the seller of its economic power in the tying market to coerce or compel the purchase of the tied product. For example, in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953), the Court held that the "common core of the adjudicated unlawful tying arrangements is the forced purchase of a second, distinct commodity with the desired purchase of a dominant 'tying' product" (emphasis added). See also *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6 (1958) (in a tying ar-

¹³ The allegations here relate to leases of real estate, which did not provide for the purchase of gasoline, and separate contracts to supply gasoline, which in many instances (*e.g.*, Mr. Parisi) were manifested only by a course of dealing, and which did not relate to the leasing of real estate.

rangement, buyers are "forced to forego their free choice between competing products"); *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962) (noting the "force" that had been applied to purchasers of the tied product); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 504 (1969) (describing the purchasers as having been "forced" to accept the tied product).

Even where there exists a written contract calling for the purchase of both the alleged tying and tied product, this is not dispositive of the issues of illegal tying. In *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974), the plaintiff alleged that in order to obtain a license to use the defendant's trademark and operate a white collar temporary personnel franchise, it was also required to license and operate a blue collar personnel franchise. The parties had entered into a written contract, which the court assumed obligated the plaintiff to operate both types of franchises. Noting that there was no evidence that the plaintiff had been coerced, had tried to avoid the requirement of operating the blue collar franchise or had sought to operate only the white collar business, the court affirmed the dismissal of the tie-in claim:

We do not think that there can be any question that no tying arrangement can possibly exist unless the person aggrieved can establish that he has been required to purchase something which he does not want to take.

.

It does not follow that because the contract required the opening of a blue collar operation, it was therefore a tying arrangement. Quite obviously, a franchise agreement, like any contract of sale may obligate the purchaser to accept numerous commodities, trademarked or not; this does not mean that the purchaser was coerced in any fashion to

take some or all to get one or some (506 F.2d at 662, 665-66).

See also *American Manufacturers Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972) ("[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice").

Capital Temporaries was followed by the Third Circuit in *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976). After reviewing *Northern Pacific*, *Fortner* and *Lowe's*, *supra*, the *Ungar* court concluded:

In view of these teachings, we simply cannot accept the district court's view that the Supreme Court has not set forth a coercion requirement in tying cases.

.

We believe that coercion has been and continues to be an integral part of the law of tying as established by the Supreme Court. (531 F.2d at 1219, 1222)

While the alleged tie-in in *Ungar* was not based on the practical economic effects of written contracts, the Third Circuit's holding on coercion is equally applicable in such a case:

We believe that coercion is implicit—both logically and linguistically—in the concept of leverage upon which the illegality of tying is premised: the seller with market power in one market uses that power as a 'lever' to force acceptance of his product in another market. *If the product in the second market would be accepted anyway, because of its own merit, then, of course, no leverage is involved*; in the language of the District Court, there is no use of the sellers' market power (531 F.2d at 1218; emphasis supplied).

Moreover, the decision below is entirely inconsistent with the *Ungar* court's statements that "what is sufficient to coerce one buyer's choice may not be sufficient to coerce another buyer's choice," and therefore "[p]roof of a tie-in must focus on the buyer, because a voluntary purchase of two products is simply not a tie-in" (*Id.* at 1219, 1224).¹⁴ In the face of these statements, the panel majority found *Ungar* was distinguishable merely because alleged tie-in here is based on the practical economic effect of the contracts utilized by the defendants.

This case is not rationally distinguishable from *Ungar*. As the district court recently stated in another case, "I have great difficulty in reconciling *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir. 1976), and *Bogosian, supra*, as to certain aspects of when class certification is appropriate and when it is not" *Aameco Automatic Transmissions, Inc. v. Tayloe*, 1977-2 Trade Cas. (CCH) ¶ 61,681 (E.D. Pa. 1977). However, since no in banc review to resolve the conflict was possible, review by this Court is necessary.

Since the essence of an unlawful tie-in is the use of economic power to force a purchaser to accept an unwanted product, the voluntary purchase of two products from a supplier is plainly not unlawful. The decision below, however, would render unlawful such a voluntary

¹⁴ See also, *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1975); *Hehir v. Shell Oil Co.*, 72 F.R.D. 18 (D. Mass. 1976). However, there is some apparent confusion among some courts with respect to this principle. See *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967), modified sub nom, *Chicken Delight, Inc. v. Harris*, 412 F.2d 830 (9th Cir. 1969), on remand, 311 F. Supp. 847 (N.D. Cal. 1970), aff'd in part and rev'd in part, 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972); *In re 7-Eleven Franchise Antitrust Litigation*, 1972 Trade Cas. (CCH) ¶ 92,829 (N.D. Cal. 1972); *Esposito v. Mister Softee, Inc.*, 1976-1 Trade Cas. (CCH) ¶ 68,866 (E.D.N.Y. 1976); see generally, Varner, *Voluntary Ties and the Sherman Act*, 50 So. Cal. L. Rev. 271 (1977).

agreement solely on the fortuitous grounds that it is either incorporated in written contracts or is the practical economic effect of a written contract. This cannot be justified—either in economic theory or logic—and review by this Court is necessary to resolve the conflicting decisions of the lower courts on this issue.

CONCLUSION

The petition for writ of certiorari should be granted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-740

GULF OIL CORPORATION, ET AL.,
Petitioners,

v.

PAUL J. BOGOSIAN,
Respondent.

GULF OIL CORPORATION, ET AL.,
Petitioners,

v.

LOUIS J. PARISI,
Respondent.

**SUPPLEMENT TO PETITION FOR WRIT
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Petitioners submit this supplemental brief to call to the Court's attention the fact that on December 28, 1977, a petition for writ of certiorari was filed in *Windham v. American Brands, Inc.*, No. 77-925, which contends that "on the face of the Circuit Court's opinion

[in *Windham*] . . . there is a conflict between its view of antitrust class action suits and that of the Third Circuit [in *Bogosian*]" (*Windham* Pet. at 16).

In the petition for writ of certiorari in the instant case, petitioners demonstrated the conflict between the Fourth Circuit's proper deference to the district court's discretion on class action issues in *Windham v. American Brands, Inc.*, 1977-2 Trade Cas (CCH) ¶ 61,670 (4th Cir., Oct. 11, 1977) (in banc), and the contrary approach adopted by the panel majority in the instant case (see Petition at 17, 23-24). As pointed out in the petition, the Third Circuit cited with approval the panel decision in *Windham*, and the Fourth Circuit's in banc opinion expressly disapproved of the approach adopted in the instant case, noting that it found "[t]he reasoning of Judge Aldisert's dissenting opinion more persuasive" (*Id.* at 72, 752, n.35a).

February 14, 1978

Respectfully submitted

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1666

No. 75-1833

PAUL J. BOGOSIAN, on behalf of himself and all those
similarly situated,

Appellant

v.

GULF OIL CORPORATION, AMERICAN OIL COMPANY, HUMBLE OIL & REFINING COMPANY, MOBIL OIL COMPANY, PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, SUN OIL COMPANY, TEXACO, INC., CITIES SERVICE OIL COMPANY, ATLANTIC RICHFIELD COMPANY, UNION OIL COMPANY OF CALIFORNIA, UNION 76 DIVISION, AMERADA HESS CORP., HESS OIL AND PETROLEUM DIVISION, GETTY OIL COMPANY, STANDARD OIL COMPANY OF OHIO, STANDARD OIL COMPANY OF CALIFORNIA

(D.C. Civil No. 71-1137, E.D. of Pa.)

No. 75-1667

No. 75-1834

LOUIS J. PARISI, on behalf of himself and all others
similarly situated,
Appellant

v.

GULF OIL CORPORATION, AMERICAN OIL COMPANY, EXXON CORPORATION, MOBIL OIL COMPANY, PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, SUN OIL COMPANY, TEXACO, INC., CITIES SERVICE OIL COMPANY, ATLANTIC RICHFIELD COMPANY, UNION OIL COMPANY OF CALIFORNIA, UNION 76 DIVISION, AMERADA HESS CORP., HESS OIL AND PETROLEUM DIVISION, GETTY OIL COMPANY, STANDARD OIL COMPANY OF OHIO, STANDARD OIL COMPANY OF CALIFORNIA, CHEVRON OIL CO.

(D.C. Civil No. 71-2543, E.D. of Pa.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued March 28, 1977

Before SEITZ, *Chief Judge*, ALDISERT and GIBBONS,
Circuit Judges.

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OPINION OF THE COURT

(Filed July 21, 1977)

SMITZ, Chief Judge.

In separate lawsuits, two independent service station dealers, Bogosian and Parisi, sued their respective lessors, Gulf and Exxon, alleging that the lease contracts imposed a tie-in in violation of § 1 of the Sherman Act. Each plaintiff also joined as party defendants fourteen other major oil companies whom they alleged, together with Gulf and Exxon, engaged in what they now argue was concerted action to unlawfully tie the leasing and subleasing of gas station sites to the purchase of gasoline supplied by each dealer's lessor. More specifically, plaintiffs alleged that, at least since 1957, and continuing to the present, "defendants, through a course of interdependent con-

sciously parallel action, have required all dealers who lease, sublease, or renew such leases or subleases for one or more of defendants' service stations to:

- (a) license the use of the lessor's trademark;
- (b) sell only the lessor's gasoline; and
- (c) not sell gasoline purchased from any other source under the licensed trademark."

Plaintiffs alleged that these restrictions forced them to buy gasoline at whatever price their lessor offered and prevented them from selling other brands of gasoline. They sought to maintain the suit on behalf of all present and former lessee gasoline dealers of the defendants.

After substantial discovery limited to the class action allegations, the district court refused to certify the class, (62 F.R.D. 124, E.D. Pa. 1973), and under 28 U.S.C. § 1292(b) certified as immediately appealable its order denying class action status. This court refused petitioners' application to appeal pursuant to § 1292(b). (Misc. Record No. 76-8087, April 17, 1974). In April, June and July of 1975 the district court granted motions for summary judgment made by all moving defendants which had had no business dealings with the named plaintiffs (non-lessor defendants), but refused the motions as to the lessors of the named plaintiffs. 393 F. Supp. 1046 (E.D. Pa. 1975). Prior to the grant of the motions no discovery had been taken on the issue of concerted action. Although plaintiffs moved for discovery under Fed. R. Civ. P. 56(f),¹ the court held that "[b]ecause the complaint fails, as a matter of law, to state a cause of action under the Sherman Act § 1 against [nonlessor defendants], summary judgment will be granted and plaintiffs' Rule 56(f) motion will be denied." (footnote omitted). The court

1. Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

granted the summary judgment motion because it concluded that the allegation of "interdependent consciously parallel action" in a complaint is an insufficient statement of the concerted action necessary to state a claim under § 1.

All of the orders granting summary judgment contained an express determination that, pursuant to Fed. R. Civ. P. 54(b), there is no just reason to delay and expressly directing entry of final judgment, although the actions were not wholly terminated by the orders. Subsequently, the district court filed a supplementary opinion expressing the reasons for its 54(b) determination. Plaintiffs timely appealed and defendants moved to dismiss the appeals contending that the entry of judgment was an abuse of discretion and should be vacated.

I. APPEALABILITY

A. Finality

Behind Rule 54(b) is the recognition that with the liberal joinder of claims and parties now permitted by the federal rules, the policy against piecemeal review implicit in the "single judicial unit" rule must be weighed against the untoward effects which can occur when decisions final as to some claims and some parties cannot be entered until the litigation is final as to all claims and all parties. The district court is not empowered to enter judgment on a decision which is not final. However, by determining that a final decision which terminates the action as to one or more but fewer than all parties or as to one or more but fewer than all claims is an appropriate judicial unit, the court can dispatch for appeal decisions which otherwise would not then be appealable because of the "single judicial unit" rule. *Wetzel v. Liberty Mutual Insurance Co.*, 424 U.S. 737 (1976); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1957). The threshold issue, therefore, is whether the order appealed from finally resolved at least one entire claim, leaving at least one separate

claim unresolved or alternatively whether the order finally determined the rights and liabilities of at least one party leaving at least one other party whose rights or liability remains undetermined.

Determination of whether multiple parties are involved within the meaning of the rule is not difficult. Prior to the 1961 amendment it was thought that a complaint charging an antitrust conspiracy against several defendants stated only one claim and dismissal of the complaint as to fewer than all defendants was not appealable under Rule 54(b). *E.g., Steiner v. 20th Century-Fox Film Corp.*, 220 F.2d 105 (9th Cir. 1955). The 1961 amendment was intended to change this result. *See* Advisory Committee Note to 1961 amended 54(b). In view of the purpose of the amendment, it is clear that even if the complaint states only one claim, the district court is empowered to enter judgment upon an order terminating the action as to one or more but fewer than all parties. *See* 6 *J. Moore, Federal Practice* Para. 54.34 [2.-2]. (2d ed. 1948).

The district court granted summary judgment and directed the immediate entry of judgment for all moving defendants except Gulf and Atlantic Richfield in No. 71-1137 (*Bogosian*) and to all moving defendants except Exxon and Atlantic Richfield in No. 71-2543 (*Parisi*); the motions for summary judgment filed by Atlantic Richfield on August 6, 1975 were denied without prejudice because they were made after plaintiffs had filed their notices of appeal. Cities Service Oil Company, a defendant in both cases, has not moved for summary judgment. Therefore, Cities Service and Atlantic Richfield remain as defendants in both cases and are not before the court on appeal. In entering judgment in favor of those defendants on this appeal other than Gulf and Exxon, the court clearly acted within its power since those defendants have been wholly terminated from both actions.

On the other hand, although Gulf has been wholly terminated in *Parisi*, it remains as a defendant in *Bogo-*

sian, while Exxon, which is no longer a defendant in *Bogosian*, remains as a defendant in *Parisi*. If the rights and liabilities of Gulf and Exxon have not been wholly terminated then, assuming arguendo that the complaint states a single claim, the district court properly could not enter judgment for them and plaintiffs could not maintain this appeal as to them. Compare *Backus Plywood Corp. v. Commercial Decal, Inc.*, 317 F.2d 339 (2d Cir.), cert. denied, 375 U.S. 389 (1963), with 6 *Moore, supra*, Para. 54.34 [2.-2] at 564.

If we were to view the suit brought by *Parisi* and that by *Bogosian* as a single unit, it would follow that judgment could not have been entered for Gulf because a live claim is pending against it in *Parisi*, nor for Exxon because a live claim is pending against it in *Bogosian*. The factors which militate toward this view are that both plaintiffs are represented by the same attorney, the suits are filed in the same forum, are before the same judge, and the complaints and the defendants are identical. On the other hand, the cases have not been consolidated for trial. It is therefore possible that the cases could be scheduled for trial at different times and be tried before different juries. The existence of this possibility strongly favors the construction that each civil action be regarded as a separate judicial unit for Rule 54(b) purposes. By its terms the rule is applicable when multiple claims or multiple parties are presented "in an action." We hold, therefore, that, at least absent consolidation for all purposes of cases separately filed, each civil action is to be viewed as a separate unit. Since the order granting summary judgment for Gulf in *Parisi* and for Exxon in *Bogosian* wholly terminated the defendants respectively from those cases, the court was empowered to enter judgment upon the orders. We need not consider, therefore, whether the allegations of the complaint state a single or multiple claim for Rule 54(b) purposes.

B. Abuse of Discretion

Once it is determined that the district court was empowered to enter final judgment under 54(b), its decision to do so can be set aside only for an abuse of discretion. *Mackey, supra*, 351 U.S. at 437. We have previously indicated that "... ordinarily an application for a 54(b) order requires the trial judge to exercise considered discretion, weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand may present. . . ." *Panichella v. Pennsylvania RR.*, 252 F.2d 452, 455 (3d Cir. 1958).

In this case we have the benefit of the district court's opinion explaining the basis for its particular exercise of discretion. We do not necessarily agree with all of the reasons proffered by the district court. We discuss only those which are important to our conclusion that its order was consistent with the sound exercise of discretion:

- (1) No disposition of the pending claim which the district court might make could moot the issues presented by the appeal of the conspiracy claim.
- (2) The questions presented by the appeal are not before the district court as to the defendants against whom live claims are pending.

We think that the question before us could be mooted by a disposition of the pending claim in the district court. As defendants argued, a resolution of the tie-in claim in favor of the lessor defendants will moot the "conspiracy claim."² In each complaint plaintiffs allege that certain provisions contained in the lease agreements between themselves and their lessors constitute an unlawful tying arrangement. They further allege that each defendant, through concerted action, imposed the same unlawful tying

2. We recognize that whether the complaint fairly alleges concerted action in the form of a conspiracy or combination is one of the issues on this appeal. For present purposes in the interest of clarity we will refer to the claim against the nonlessor defendants as the "concerted action" or "conspiracy claim."

arrangement on its lessees. Thus, if after trial and appeal, the contractual arrangements in issue on the pending claims against the lessors were found not to amount to an unlawful tying arrangement, plaintiffs would be collaterally estopped from relitigating the lawfulness of the same contractual arrangements against the remaining defendants.³

Defendants also contend that a district court decision in favor of plaintiffs would moot the claim involved in this appeal. They argue that plaintiffs can recover the full amount of their damages from the lessor defendants obviating the need to litigate against the nonlessor defendants. We cannot accept this reasoning. We know of no principle of law which would preclude suit by plaintiffs against alleged co-conspirators of defendants against whom a judgment has been obtained. The purpose of the antitrust laws would be ill-served if defendants implicated in a broad based unlawful conspiracy could avoid trial simply by pointing to the possibility of plaintiffs obtaining full monetary relief against other defendants in a related antitrust action. Moreover, eliminating the 13 nonlessor defendants from trial would preclude plaintiffs and the class from obtaining the injunctive relief sought against those defendants.

The second point we question is whether the issues before us on this appeal may again require attention by this court on a subsequent appeal. As we have indicated, two of the 15 defendants, Atlantic Richfield and Cities Service are not now before this court. A decision by this court in favor of plaintiffs on any issue would not bind the absent defendants. Nevertheless, if in that situation the district court were to decide either the summary judgment motion

3. Since the nonlessor defendants are not parties in the claim pending in the district court, mutuality is lacking. Nevertheless, we have indicated that a lack of mutuality will not preclude defensive use of collateral estoppel at least absent special circumstances indicating unfairness. *Provident Tradesmen's Bank & Trust Co. v. Lumbermen's Mutual Cas. Co.*, 411 F.2d 88, 92-94 (3d Cir. 1969). See also *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

or class action issue against the absent defendants in a manner consistent with our decision as to the other defendants, the absent defendants could appeal that decision at the appropriate time, forcing us to consider these issues again. While we agree that such is the law, we do not agree that such an eventuality necessarily makes it inappropriate to enter final judgment without delay.

We have noted that with the advent of the 1961 amendment it is now possible in appropriate cases to enter final judgment as to some but fewer than all parties even though a single claim is involved. In that situation, it would be clear that the court of appeals might be forced to consider the same claim again as to the parties against whom no judgment had been entered at the time of the appeal. Thus, we conclude that that fact alone cannot make it inappropriate to enter final judgment as to some but fewer than all parties.

We have the benefit on this appeal of the joint brief of 13 defendants, 11 of whom are nonlessors with whom Atlantic Richfield and Cities Service are similarly situated. Although our mandate will not bind the absent defendants, we recognize, nevertheless, that the operation of stare decisis is unlikely to make full reconsideration of the issues decided on this appeal unlikely if and when those issues are tendered on a subsequent appeal.⁴ We conclude, therefore, that the fact that absent defendants might on a subsequent appeal raise issues which must now be considered if the entry of judgment under 54(b) stands, is not a significant factor in this case.

In sum, the district court was faced with a complex antitrust case stating two theories, a conspiracy-tying allegation resolution of which was final as to 13 defendants, and a contract-tying allegation which was pending trial and involved two defendants. There is a possibility that

4. "To avoid conflicts in panel decisions no subsequent panel may overrule a published opinion of a previous panel. Court in banc consideration is required to overrule a previous decision of this Court." *Internal operating Procedures of the United States Court of Appeals for the Third Circuit at 13.*

decision on the contract theory pending trial could moot the question presented on the appeal from the conspiracy-tying theory. Nevertheless, a decision on that claim might take a number of years to reach, and, in the interim, the defendants would bear the uncertainty arising from the fact that they may be forced to defend a massive antitrust claim years in the future. More importantly, an appellate decision reversing the entry of summary judgment on the conspiracy-tying claim might necessitate a second trial, at least part of which would involve proof the same alleged tying arrangement involved in the trial of the contract-tying theory. Moreover, because the summary judgment was granted on the basis of the pleadings, our need to examine the record at this stage is minimal. We will thus not be twice forced to master the complex factual situation underlying the claims of the existence of a conspiracy and the validity of the alleged tying arrangements.

The immediate entry of final judgment will promote a unified disposition of the substantive tying claims presented here as to all defendants without significantly delaying the disposition as to the two lessor defendants and without causing duplication of effort by this court. These matters lie at the heart of the tension between the conflicting policies inherent in Rule 54(b). We find no abuse of discretion in the district court's implicit determination that the policy against piecemeal review was not unduly frustrated by immediately entering these judgments.

Defendants contend that assuming that the entry of judgment under Rule 54(b) was proper, there is no jurisdictional basis to appeal the earlier order of the district court denying class action certification. They argue that if we were to reverse the summary judgments, the issue would be moot, while if we affirm, the case merely reverts to the status ante. It is anomalous, they suggest, that our prior refusal to entertain the class action issue under 28 U.S.C. § 1292(b) should suddenly be reversed when the conspiracy-tying claim is appealed under Rule 54(b).

Defendants' argument fails to take cognizance of *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 245 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975), which decided this precise issue. As *Wetzel* indicates, defendants' argument fails to note the distinction between 28 U.S.C. § 1292(b) and Rule 54(b). A district court is not empowered to certify issues for appeal under Rule 54(b) but only to enter judgment without delay on decisions which are final under 28 U.S.C. § 1291. It is axiomatic that an appeal taken from a judgment entered under 54(b) brings to the court of appeals all issues determined in the district court which would be reviewable on an appeal from any final judgment.

II. SUMMARY JUDGMENT

A. Standard of Review

Plaintiffs contend that notwithstanding that the district court styled its order as one granting summary judgment, the order should be reviewed as one granting a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. "It is a familiar principle that the label which a district court puts on its disposition of a case is not binding on a Court of Appeals." *Tulley v. Heyd*, 482 F.2d 590, 593 (5th Cir. 1973). We therefore look to the course of proceedings and basis for decision in the district court to evaluate plaintiffs' contention.

At the time the motions for summary judgment were made, discovery had been undertaken which was principally concerned with the issues raised by the class action allegations. Generally speaking the motions were grounded on two theories. The first was that as to the nonlessor defendants, plaintiffs lacked standing under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. This argument was based upon plaintiffs' depositions in which they severally stated that the nonlessor defendants had not damaged them in their business or property and that they had

no knowledge of a conspiracy among the defendants. The second theory was that the complaints failed to allege concerted action sufficient to state a claim under section 1 of the Sherman Act. Plaintiffs moved for denial of the motions under Rule 56(f), submitting the required affidavit and saying that plaintiffs were unable properly to respond to the motions without an opportunity to conduct discovery concerning the "conspiracy" claim.

The district court held that "[because] the complaint fails, as a matter of law, to state a cause of action under Sherman Act §1 against [the nonlessor defendants], summary judgment will be granted and plaintiffs' Rule 56(f) motion will be denied." 393 F. Supp. at 1049 (footnote omitted). The district court rejected the nonlessors' standing argument as a basis for summary judgment, ruling that plaintiffs' deposition testimony was inconclusive.

It is clear from the district court's opinion that it excluded everything but the complaint in granting the motions. Moreover, the record before us shows that the discovery which had been taken was directed solely toward the class action issues. The memorandum in support of plaintiffs' Rule 56(f) motion indicated that the evidence which would support its theory of a combination or conspiracy was, as it usually is in such cases, in the hands of defendants and that summary judgment should not be granted without affording plaintiffs an opportunity for discovery on the issue of concerted action. "[W]e have said that where the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course." *Costlow v. United States*, No. 76-1659, slip op. at 6 (3d Cir. March 22, 1977), citing *Ward v. United States*, 471 F.2d 667, 670-71 (3d Cir. 1973). The district court regarded discovery as irrelevant, however, because it based its decision solely on the complaint which it thought failed to state a claim as a matter of law.

The district court could dismiss for failure to state a claim upon motion for summary judgment, but a motion

so decided is functionally equivalent to a motion to dismiss. *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270, 273 (2d Cir. 1968); *Moore, supra* Para. 56.02[3], at 2035. We therefore think it appropriate to review the order as we would one dismissing the complaint with prejudice for failure to state a claim. *E.g., Tulley v. Heyd, supra*, 482 F.2d at 593-94; *Marvosi v. Shorty*, 70 F.R.D. 14, 17 (E.D. Pa. 1976); see *Grzelak v. Calumet Publishing Co., Inc.*, 543 F.2d 579, 583 (7th Cir. 1975).

The standards by which the orders must be tested is whether taking the allegations of the complaint as true, *Cooper v. Pate*, 378 U.S. 546 (1964), and viewing them liberally giving plaintiffs the benefit of all inferences which fairly may be drawn therefrom, see *Murray v. City of Milford*, 380 F. 468, 470 (2d Cir. 1967), "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Hospital Building Co. v. Trustees of Rex College*, 425 U.S. 738, 746 (1976).

B. Sufficiency of the Complaint

The first amended Bogosian complaint made a number of allegations of unlawful practices which it alleged were accomplished by a "conspiracy" among defendants "through a course of interdependent consciously parallel action pursuant to a tacit understanding by acquiescence coupled with assistance . . ." The second amended complaint eliminated all allegations of unlawful practices except for the tying claims which we have discussed *supra*. Conspicuously absent as well is any reference to a conspiracy. Instead the second amended complaint makes the following reference to concerted action:

"13. For many years past, the exact date being presently unknown to plaintiffs, but at least as early as 1957, and continuing to the present, defendants, through a course of interdependent consciously parallel action, have required all dealers who lease . . ."

"14. The leasing practices of the defendants, individually and collectively, through interdependent consciously parallel actions, as aforesaid, including the use of short-term leases, leases based on contracts for the sale of lessor's brand of gasoline, and other contractual arrangements, have enabled the defendants to compel the lessee-dealers to purchase the lessor's brand of gasoline and not to purchase any other brand of gasoline for resale.

....

"16. The unlawful acts of defendants as aforesaid constitute an unreasonable combination in restraint of interstate trade and commerce in the marketing of gasoline in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

"17. By means of their unlawful acts and pursuant to and in furtherance of the above-described combination, the defendants have in substantial measure succeeded in jointly accomplishing the following:

....

"19. As a result of the defendants' unlawful combination, plaintiff and the members of the class have suffered, and unless defendants are enjoined, will continue to suffer irreparable harm . . ."

The district court held that the complaint failed to allege either a "contract or conspiracy," and that the allegation of "interdependent consciously parallel action" did not plead the concerted action required to state a claim under § 1. Although the court recognized that, together with other evidence, consciously parallel business behavior may support an inference of conspiracy, it thought that an allegation of contract, conspiracy or combination is essential to state a claim. The court regarded the omission of the word "conspiracy" for the complaint to be a "deliberately employed strategy" by "experienced and learned

attorneys in the field of antitrust litigation." Thus, it reasoned that although it terminated plaintiffs' actions for failure to plead the word "conspiracy" it was not resurrecting the requirement of pleading "magic words" which characterized common law pleading.

Plaintiffs argue that the complaint fairly read as a whole alleges a "combination," and that such an allegation combined with a statement of the specific course of conduct alleged to be unlawful clearly states a claim. We agree.

Paragraphs 16, 17 and 19 of the second amended complaint [hereinafter complaint], quoted *supra*, expressly refer to an unlawful combination. It is unnecessary to restate defendants' linguistic arguments to the effect that the word "combination" was not used to refer to an actual combination. Suffice it to say that their acceptance would hardly be consistent with the precept that the complaint be liberally construed.

Even if we had no doubt that plaintiffs' substitution of "combination" for "conspiracy" was deliberate and purposeful, we would be unwilling to speculate at this stage as to plaintiffs' theory. Plaintiffs' complaint alleges an unlawful combination and their briefs have not sought to explain that allegation in terms other than that of a classic combination or conspiracy. We perceive no distinction between the terms combination and conspiracy which would distinguish the two complaints. Our reading of § 1 cases indicates that the two terms are used interchangeably. As one commentator has noted, the cases have interpreted the statute as "present[ing] a single concept about common action, not three separate ones: 'contract . . . combination or conspiracy' becomes an alliterative compound noun, roughly translated to mean 'concerted action.' There is little need to grapple with issues about the meanings of the particular words of the statute nor to mark nice distinctions among them." L. Sullivan, *Law of Antitrust* 312 (1977). We therefore consider the sufficiency

of a complaint which fairly read alleges a combination or conspiracy based upon interdependent consciously parallel action among defendants to impose allegedly unlawful tie-in agreements upon defendants' respective lessees.

The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action. *Compare Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), with *First National Bank v. Cities Service Co.*, 391 U.S. 253, 274-88 (1968). We recently articulated those circumstances in *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975):

"(1) a showing of acts by defendants in contradiction of their own economic interests . . . ; and

"(2) satisfactory demonstration of a motivation to enter an agreement . . ."

Id. at 1314 (citations omitted).

Plaintiffs argue that, given an opportunity to conduct discovery, they will prove that both of these circumstances are present. They contend that independent self interest would indictate that each oil company seek to market gasoline to their competitors' lessees, and that the failure to so compete can be explained only by a mutual understanding, tacit or expressed, that gasoline be marketed to lessee-dealers on an exclusive basis. The motivation to participate in such an agreement, of course, is the elimination of price competition among oil companies at the wholesale level. We need not, at this time, consider whether this theory would necessarily carry the day, for we are satisfied that, at the least, it does not appear to a certainty that plaintiffs can prove no set of facts which under *Venzie* would entitle them to reach the jury.

Defendants argue nevertheless, and the district court held, that the failure to allege an agreement is fatal to plaintiffs' claim. We think that this position is based upon a misunderstanding of the limited role of the complaint in federal practice. It is not necessary to plead evidence, nor is it necessary to plead the facts upon which the claim is based. "To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

The detailed statement of parallel lease provisions contained in plaintiffs' complaint which are alleged to be the product of an unlawful combination clearly meets these requirements. It was not necessary for plaintiffs to plead the basis upon which that combination will be proven. The goals of efficient judicial administration are retarded, not advanced, when the pleadings are used as a battleground for legal skirmishes without the necessary factual development upon which to focus decision. *Clark, Special Pleading in the "Big Case,"* 21 F.R.D. 45 (1957). We think it was error to conclude that the complaint failed to state a claim under Section 1.

Plaintiffs also contend that even if their complaints are construed not to allege a combination, that an allegation of interdependent consciously parallel action states a § 1 claim. Neither plaintiffs nor defendants offer a definition of interdependence, however. A situation of interdependence has been said to exist when, in a highly concentrated market, there is an awareness that, because of the limited number of sellers, any variation in price or price-related structures will necessarily have a demonstrable effect on the sales of others such that each firm bases its decisions, at least in part, on the anticipated reactions of the others to its initiative. *See Sullivan, supra*, § 116.

There is a lively debate, however, concerning the relationship of interdependence to collusion. On the one hand, Professor Posner, for example, has said that interdependence cannot occur without, and hence is a product of, collusion. See Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562-76; 1591-92 (1969). On the other hand, Professor Sullivan has said that interdependence can exist apart from collusion, but that noncollusive interdependent activity can, under certain circumstances, amount to an unlawful combination. *Sullivan*, *supra* § 122; See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 660-81 (1962).

If these theories are to be tested, it should be done on a fully developed factual record which probes the conflicting economic facts on which they are premised. The complaint is much too blunt an instrument with which to forge fundamental policies regarding the meaning of competition in concentrated industries. Cf. *White Motor Co. v. United States*, 372 U.S. 253 (1963). We conclude that the ruling that the specific allegation of interdependent consciously parallel action made here fails to state a claim should be vacated so that the issue can be decided, if necessary, after the relevant facts are fully developed.

C. Standing Under §§ 4 and 16

In their motions for summary judgment and on appeal, defendants argued that plaintiffs lacked standing under §§ 4 and 16 of the Clayton Act⁵ to challenge the practices

5. Section 4, 15 U.S.C. § 15 provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16, 15 U.S.C. § 26 provides *inter alia*:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a viola-

of those defendants with whom they had no business dealings. Although the district court rejected this position, if we were to accept it, we would be required to affirm the grant of summary judgment.⁶ See *California Bankers Association v. Shultz*, 416 U.S. 21, 71 (1974); *Jurinko v. Edwin L. Wiegand Co.*, 477 F.2d 1038, 1045 (3d Cir.), *vacated on other grounds*, 414 U.S. 970 (1973).

The gravamen of the complaints is that defendants jointly imposed a system of lease arrangements which eliminated wholesale price competition among defendants on sales to independent dealer lessees. The fact that each plaintiff and class member had direct business dealings with only one defendant is not dispositive, for plaintiffs allege that it was the joint participation of all defendants in the unlawful scheme which made possible the charging of supracompetitive prices to each dealer by his supplier. Thus, this case is similar to one in which defendants conspire to fix prices in sales to their customers. The fact that a customer has not made purchases from every co-conspirator does not prevent him from suing all—for each co-conspirator contributed to the charging of the supra-competitive price paid by the purchaser.

Plaintiffs allege that the purpose and effect of the tie-in practice is to eliminate wholesale competition thus affecting the price and other conditions surrounding their purchase of gasoline. The injury of which they complain is the immediate, direct and proximate consequence of

5. (Cont'd.)

tion of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings, . . .

The parties have not pointed to any doctrinal distinctions between sections 4 and 16 which would require individual discussion of the issues under each. We will, therefore, for the sake of convenience, discuss both problems together under § 4.

6. On first glance it may seem anomalous that we discussed nonjurisdictional issues prior to discussing standing. The policy of limiting liability implicit in § 4 which has evolved under the rubric of "standing," however, is a concept of proximate causation distinct from the concept of personal stake necessary to establish article III jurisdiction. Our discussion here deals only with the former concept which has been misnamed "standing."

defendants' actions. Since the unlawful practices of which plaintiffs complain were imposed directly upon them, they are the logical suitors to vindicate the antitrust laws.

Defendants argue that the deposition testimony of Bogosian and Parisi establishes that neither has any claim against nonlessor defendants, that neither attempted to purchase gasoline from any defendant other than his lessor, and that neither made a claim of concerted action by his lessor with the other defendants.

The record indicates that the reason plaintiffs did not seek to purchase gasoline from other oil companies was not their lack of desire to do so, but that they feared termination of their leaseholds if such an attempt were made, or that such an attempt would be futile. We also reject the argument that an antitrust plaintiff's statement that he was not injured by alleged co-conspirators demonstrates his lack of standing as to them. As the district court noted, "plaintiffs would not be expected to understand the legal ramifications or even be aware of the activities of the defendants which may have injured them." 393 F. Supp. at 1050 n.7. Plaintiffs might not even be fully aware of the economic impact of a broad based conspiracy on the structure of the industry and of the complex of economic forces flowing from it which might adversely affect their businesses. We hold that the district court correctly concluded that there is no basis in this record for granting summary judgment on the ground of lack of standing.

III. REFUSAL TO CERTIFY UNDER 23(b)(3)

Before certifying a class under Rule 23(b)(3), the district court must determine that the four prerequisites contained in 23(a) are satisfied, "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Before making its finding on predominance, the court must, of course, identify the issues involved in the lawsuit and which are common, and before making its finding on the superiority of the class action device, it must apply the fairness and efficiency criteria contained in the rule.

In *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756-57 (3d Cir. 1974) (*in banc*), we articulated the standard of review applicable to class action decisions. We must decide whether the 23(a) prerequisites have been met, whether the district court correctly identified the issues involved and which are common, and whether it properly identified the comparative fairness and efficiency criteria. If the court's analysis on these points is correct, then, "it is fair to say that we will ordinarily defer to its exercise of discretion" embodied in the findings on predominance and superiority. *Id.*

A. Prerequisites to Maintaining Class Action

Although the district court did not discuss the prerequisites expressly, the structure of its opinion leads us to believe that it regarded them as having been met. Based upon our independent review of the record we conclude that all have been satisfied. We discuss each briefly:

(1) Numerosity. Estimates of the number of class members have varied between 100,000 to 2 million, but it is conceded by all parties that the numerosity requirement has been met. (2) Common Questions. It is also clear that there are at least some issues of both fact and law which are common to the class as our discussion in the next section illustrates. (3) Representative claims typical. The claims pressed by the representatives are identical to those which they press on behalf of the class generally. Beyond this general observation there appears to be nothing which would fall under this rubric which is not also covered by one of the other subsections. See 3B J. Moore, *Federal Practice*, Para 23.06-2 (2d ed. 1948). (4) Adequacy of

Representation. This prerequisite embodies concerns which fall into two categories: that the representatives and their attorneys will competently, responsibly and vigorously prosecute the suit, and that the relationship of the representative parties' interests to those of the class are such that there is not likely to be divergence in viewpoint or goals in the conduct of the suit. See *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465, 469 (S.D. N.Y. 1968); 3B *Moore, supra* Para 23.07. We see no problem concerning the first aspect. The district court has described counsel for plaintiffs as "experienced and learned attorneys in the field of antitrust litigation." 393 F. Supp. at 1048 n.5. With regard to the second, however, the district court was concerned that the potential may develop for a divergence of interests between former and present lessees. In that situation the adequacy of the representation of the named representatives, neither of whom is a former lessee of a defendant who is not also a present lessee of a defendant, might be questioned.⁷ Nevertheless, as the district court recognized, it is equipped by Rule 23(d) to deal with this situation by a variety of means, including certification of subclasses, if and when its concerns ripen. In short, on this record, there is no basis to deny class certification on the basis of inadequacy of representation.

B. Identification of Common Questions

1. The Elements of A Tying Violation

a

The elements of a Sherman Act § 1 tying violation are well settled. As we indicated in *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir. 1976), a per se violation is established when plaintiff proves three elements: the existence of a tie, "that the seller has sufficient

7. Parisi was a lessee of Exxon from 1968-71, but is now, according to his deposition testimony, a lessee of Atlantic Richfield.

economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product," and "that a 'not insubstantial amount of interstate commerce is affected.'"⁸ *Id.* at 1223-24 quoting *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).

Relying upon *Ungar*, defendants appear to argue that coercion is a requirement of proof in all tying cases. Neither *Ungar* nor any other case has so held. Rather, *Ungar* affirmed that under a long line of Supreme Court precedent a tying claim consists solely of the three elements quoted above. Assuming economic power over the tying product and a not insubstantial amount of commerce, the plaintiff need only show that a seller conditioned the sale of one product (the tying product) on the purchase of another product (the tied product). It has never been an element of plaintiff's case to disprove, nor even a permitted defense, that the tied product is superior to others available on the market, or that even without the tie requirement plaintiff would have purchased the tied product. The short answer to defendants' contention is, and has always been, that without a tie requirement, "[i]f the manufacturer's brand of the tied product is in fact superior to that of competitors the buyer will presumably choose it anyway." *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949). Cf. *United States Shoe Machinery Corp. v. United States*, 258 U.S. 451, 462 (1922).

The purpose of the rule against tying is to insure that a buyer's choice is counseled solely by his perception of the merits of the tied product, so that the seller with economic power over the tying product does not gain an artificial advantage over competitors engaged in sales of the tied product. The antisocial conduct which the rule seeks to deter is the *act of the seller conditioning* sale of one product upon purchase of another. One can hardly imagine

8. We believe that proof that a not insubstantial amount of interstate commerce is affected can be adduced on a common basis and consequently that element will not be further discussed.

anything which would vitiate that purpose more than a requirement that a violation depends upon proof that the buyer bringing suit would not have purchased the tied product but for the tie requirement. The issue is whether the seller acted in a certain way, not what the buyer's state of mind would have been absent the seller's action.

The rule for which defendants contend would be analogous to a rule in price-fixing cases either requiring plaintiffs or permitting defendants to prove that the market set prices would have been no lower than the fixed prices—a proposition long since put to rest. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23, 229 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-401 (1927). We therefore conclude that once a plaintiff proves that a defendant has conditioned the sale of one product upon the purchase of another there is no requirement that he prove that his purchase was coerced by the seller's requirement.

b

A number of cases have recognized, however, that an illegal tie-in may exist even when the seller has not expressly conditioned the sale of one product upon purchase of another, if the existence of a tie-in can otherwise be established from business conduct. *E.g.*, *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 64 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). In many situations in which the existence of a tie-in is proven on the basis of business conduct, a dominant party, such as a franchisor, suggests, persuades or requests that the economically dependent party, such as a franchisee, purchase certain products in conjunction with other products which the franchisee sought to buy. The claim is that there is more in this seemingly innocent conduct than meets the eye. The franchisee claims that the franchisor has created an economic arrangement in which the perceived threat of termination buttresses the franchisor's salesmanship. We

considered this type of claim in the context of a class action certification in *Ungar, supra*.

In *Ungar*, all of the franchise agreements avoided conditioning the sale of the allegedly tied products on the purchase of the franchise, and some affirmatively secured to the franchisee the right to purchase those products from other suppliers. Plaintiffs nevertheless claimed that this right was illusory because they were coerced into accepting unwanted products from the franchisor or its designee. The district court held that the “‘individual coercion mode of proof of use is inapplicable in a class context. . . .’” and that “‘. . . [P]ersuasion or influence may be the virtual equivalent of coercion where there is an unequal relationship between the parties . . . ,’ [or [that] use of economic power in a class context may be inferred] ‘from the acceptance by large numbers of buyers of a burdensome or uneconomic tie.’” 531 F.2d at 1217 quoting 68 F.R.D. at 114-15. We rejected this conclusion holding that, on the facts of that case, coercion was a necessary element of a prima facie case and that each franchisee must prove coercion on an individual basis. 531 F.2d at 1226.

Although in *Ungar* we spoke of coercion as being implicit in the leverage concept upon which the tying rule is premised, we were not articulating coercion as a separate legal element of proof. As we indicated in III B 1 *a supra*, leverage or coercion is implicit when plaintiff proves the conditioning of sales of one product upon purchase of another. We read *Ungar* to have required coercion to be proven only because the conditioning of the sale of one product upon purchase of another was not reflected in the agreement or in the operation of its terms. We refused to “construct” such a condition from proof of salesmanship coupled with dominance of the seller over the buyer. The principle of *Ungar* is that when a class action tie-in claim is made, without basis in an express agreement,⁹ proof of

9. Neither in *Ungar* nor in this case are we faced with the situation in which the existence of a tie-in is attempted to be shown by a uniform writing extrinsic to the agreement.

salesmanship coupled with inequality of bargaining power does not prove the existence of a tie, but rather proof of actual coercion on an individual basis is necessary to prove the existence of a tie.

c

All but one of the cases which we have found discussing coercion as an element of proof in a tying claim have application to the situation in which the existence of a tie-in is sought to be proved on the basis of a request or suggestion coupled with pressure, intimidation, in short—coercion.¹⁰ In *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972), for example, an insurance company developed an advertising program which called for sponsoring the Evening Report over a number of local stations. During negotiations with ABC, the company was able to add at least some of the 28 stations it particularly desired to the 99 station lineup originally offered. It later contended that the lineup included 32 unwanted stations which were allegedly tied to the desirable stations. The Second Circuit affirmed the finding of the district court that the company had not proven that it was coerced to accept the lineup agreed upon. Coercion was an essential element of proof in that case because the existence of two separate products necessary to establish a tie could not be determined without reference to the buyer's state of mind, since advertising on one configuration of stations as opposed to another cannot be differentiated apart from the particular advertiser's wants. *See also Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1326-1331 (5th Cir. 1976) (coercion required when lease agreement specifies that franchisee free to obtain putative tied product from any source); *Davis v. Marathon Oil Co.*, 528

10. See note 11, *infra*.

F.2d 395 (6th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3250 (1976) (claim of tie-in of TBA to gasoline rejected when lease did not require purchases and evidence did not show coercion); *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972) (coercion required when putative tie based upon request to purchase TBA rather than requirement to do so).

One case, *Capital Temporaries, Inc. v. The Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974), does not fit within this pattern. A coercion requirement was regarded in that case as part of the analysis of the third element of a tying claim: dominance or economic power in the market for the tying product. The case has been so regarded in the Second Circuit. *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976).

There have been several cases in which the claim that actual coercion was necessary to prove the existence of a tie-in has been rejected because the seller expressly conditioned sale of one product upon purchase of another. *E.g.*, *Hill v. A-T-O, Inc.*, *supra*; *Aamco Automatic Transmissions, Inc. v. Tayloe*, 407 F. Supp. 430 (E.D. Pa. 1976); *Esposito v. Mister Softee, Inc.*, 1976-1 Trade Cas. Para 60,887 (E.D.N.Y. 1976).

2. The Existence of a Tie-In

In order to apply the legal standards stated above to the claims made here, it is necessary to first identify in greater depth the nature of the claims. The complaint indicates that plaintiffs seek relief on two distinct grounds. Plaintiffs contend that it is illegal for defendants to require as a condition to the leasing of a gas station site that the lessee purchase gasoline only from defendants (lease claim). The second claim is that it is illegal for defendants to require dealers to sell only gasoline supplied by defendants from pumps bearing their trademark (trademark claim).

a. Lease Claim

There is no single lease provision which requires that the lessee purchase all gasoline from his lessor. Plaintiffs contend that a constellation of lease provisions in each agreement accomplish the same result, however. These provide that the lease shall expire in 6 or 12 months, that lessee can make no alterations to the leasehold without lessor's approval, that lessee must license the use of lessor's trademark, that as a condition of the trademark, lessee not sell gas other than that provided by lessor from pumps bearing lessor's trademark, that lessee pay rent as a percentage of gas volume sales subject to a minimum rent, and that the lease shall terminate whenever the lessee fails to purchase a stated quantity of gasoline.

Defendants argue that these provisions would not prevent a lessee from installing his own pumps and tanks from which to sell other brands of gas. Plaintiffs assert that it is uneconomical to invest thousands of dollars in construction of tanks and pumps on a 6- or 12-month lease, that such alteration is grounds for termination, and that the minimum purchase quotas would insure termination if competing brands were sold.

The district court held that since there is no single lease provision which expressly requires lessees to purchase gas from defendants, the lease tie-in claim presented disparate legal and factual questions because (i) it would be necessary to make "a factual determination in each and every lease that there was such economic coercion in fact as to constitute an illegal tie-in agreement; and (ii) maintenance as a class action would require the examination of over 400 various contractual forms used by the 15 defendants to determine whether the various leases have the effect of precluding purchase of gasoline from other than the lessor.

(i) Coercion

We cannot agree with the district court that proof of coercion is necessary to the existence of a tie-in on the

theory under which the lease claim is brought. Plaintiffs do not contend that defendants pressured them into refraining from selling competing brands, but that the lease contracts themselves precluded them from doing so. Defendants acknowledge that the only way a lessee could sell other brands under the lease agreements would be to install his own pumps and tanks. Whether such a course is realistically open to a short term lessee is a common question of fact which can be developed by expert testimony concerning the relative costs and benefits of making such installations. Similarly, a lease provision which permits termination of the lease when a stated quantity of gasoline is not purchased from the lessor hardly leaves the lessee open to reject some or all of the lessor's gas in favor of that of a competitor. If plaintiffs are able to show that the lease agreements in use by all defendants have similar clauses which have the practical economic effect of precluding sale of other than the lessor's gasoline, they will have shown that the purchase of gasoline was tied in to the lease of the service station. Under these circumstances the lease agreement itself conditions the sale of one product (here a lease) upon purchase of another, and as we indicated in part III B 1 a, *supra*, proof of coercion is not a required element of plaintiffs' case.¹¹ Thus, this case differs from *Ungar* in which plaintiffs' proof of the existence of a tie-in focused not on the terms of the agreement but on proof of salesmanship accompanied by threats of termination.¹²

11. One case, *Hehir v. Shell Oil Co.*, 1976 Trade Cas. Para 60,928 (D. Mass. June 8, 1976), reached a contrary result on what appear to be identical facts. The court did not explain why it regarded coercion as a required element of proof, however, and the case, therefore, does not persuade us.

12. It follows from the foregoing discussion that if class certification is granted, plaintiffs will be precluded from introducing evidence of threats of termination to prove the existence of a tie-in. *Ungar, supra*. Similarly, plaintiffs could not prove that they were precluded from installing tanks and pumps by the clause requiring the lessors' approval of leasehold alterations if proof that such approval would be withheld depended on specific instances of the clause being exercised in that manner.

(ii) *Variety of Contractual Forms*

Assuming that plaintiffs do not have direct evidence of a conspiracy among the defendants, it will be necessary for plaintiffs to introduce evidence of the various lease agreements used by each defendant in order to show parallel business behavior from which a conspiracy can be inferred. If the action were not sought to be maintained on a class basis, a single plaintiff, in order to prove a conspiracy on this basis, would have to prove this much.¹³ When the action is brought by the class, the nature of the proof is no different, however. Plaintiffs claim is not that each defendant imposed a tie-in on every dealer, but that all defendants conspired to impose tie-in arrangements on each dealer and that without the agreement of all, none could do so successfully. Thus, the district court incorrectly identified the legal issue. While the nature of the claim is such that proof will be detailed and lengthy, the factual and legal questions presented in this phase will be precisely the same in a class action as they would be in an individual suit.

b. *Trademark Claim*

Plaintiffs contend that all gasoline of the same octane rating is fungible, that defendants, in fact, exchange their gasolines when convenient, and, citing *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972), that defendants' trademarks should therefore be regarded as warranting only the quality rather than the source of the gasoline. The district court noted:

defendants concede that a trademark protection clause in one form or another is contained in every lease agreement or arrangement between the defendant oil companies and their respective lessees. These clauses,

13. If plaintiffs had direct evidence of conspiracy, it would be unnecessary to prove that each defendant actually imposed the tie-in upon its lessees, only that each agreed to do so. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-226 n.59 (1940).

are the primary basis for plaintiffs' claims of illegal tying agreements. In general, the trademark protection clauses, however worded, prohibit a lessee from selling any gasoline under the lessor's trademark or brand name or from any of the pumps or tanks bearing lessor's trademark or brand name or insignia, unless such gasoline is sold and supplied to lessee by the lessor. 62 F.R.D. at 128 (footnote omitted)

The court also opined that "[I]f the sole question were whether such trademark protection clauses, however worded, constituted in and of themselves violation of the antitrust laws, a class action for determining the legality of such a clause might be appropriate." *Id.* at 136.

We think that these statements indicate that the trademark claim presents a uniform question of law common to the class. Fairly read, plaintiffs' contention is that the trademark protection clauses, both singly and in conjunction with other clauses evidence an antitrust violation. Even assuming that the court were correct in its conclusion that the lease claim is not appropriate for class determination, it nevertheless should have considered certification of the trademark claim under Rule 23 (c)(4)(A).

3. *Sufficient Economic Power Over the Tying Product (leaseholds) to Appreciably Restrain Competition in the Tied Product (wholesale gasoline sales)*

The district court recognized that strategic land sites can be used as a tying product, but thought that in order to maintain a class action it would be necessary to determine that every oil company-leased station in the country was so strategically located as to be able to restrain competition in the tied product. We agree with plaintiffs that market power can be demonstrated without examining whether each gas station is strategically located. Plaintiffs could show, for example, that the defendants controlled a majority of existing service stations and that

because zoning restrictions and high capital costs make development of new stations difficult, the defendants have sufficient market dominance over existing stations to impose a tie-in. We find unpersuasive defendants efforts to distinguish *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958). See generally *United States Steel Corp. v. Fortner Enterprises, Inc.*, 45 U.S.L.W. 4171 (U.S. Feb. 22, 1977); *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969).

4. Existence of a Conspiracy

The district court was correct in concluding that this question is one common to the class.

5. Fact of Damage

If plaintiffs prove a violation of the antitrust laws they must still prove that they have suffered the "fact of damage" as a consequence of the violation in order to recover under § 4. The district court seems to have assumed that the fact of damage would have to be proven on an individual basis. For the reasons we will discuss, there is nothing in this record which persuades us that this necessarily is the case.

There are two distinct aspects to what in antitrust literature has come to be known as a requirement of fact of damage in private suits under § 4 of the Clayton Act. See Pollock, *The "Injury" & "Causation" Elements of a Treble-Damage Antitrust Action*, 57 Nw. L. Rev. 691 (1962). One of these is founded upon the recognition that some limitation must be placed upon liability stemming from violations which may have a widespread and unforeseeable ripple effect throughout the economy. Thus, notwithstanding the language of § 4 that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . .," as a matter of policy, courts have uniformly limited the private action to those plaintiffs whose injury is

not too indirect, remote or incidental a consequence of a violation. This policy has been expressed under the rubric of "standing" and implemented under a "target area" test, see, e.g., *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971), or by a more detailed, functional inquiry. See *Cromar Co. v. Nuclear Material Equipment Corp.*, 543 F.2d 501, 506 (3d Cir. 1976). We have addressed this aspect, *supra* and will not refer to it again.

The second aspect is comprised of two elements—that plaintiff suffered some loss in his business or property and that there is a causal relationship between the violation and the loss. Fact of damage in this sense is purely factual and does not involve questions of policy in its routine application. It advances no policy apart from the simple concept of causation—that plaintiff has suffered loss as a consequence of the violation. See *Bigelow v. United States*, 327 U.S. 251, 257-60 (1946).

Since, as we have indicated, the second aspect of fact of damage is a simple concept of causation, any evidence which is logically probative of a loss attributable to the violation will advance plaintiff's case. There is absolutely no requirement that the loss be personal or unique to plaintiff, so long as the plaintiff has suffered loss in his business or property, for as we have noted, this second aspect of fact of damage is not concerned with any policy of limiting liability. Thus, when an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual. Whether or not fact of damage can be proven on a common basis therefore depends upon the circumstances of each case.

Our conclusion is not at variance with recent cases in other circuits indicating that fact of damage could not be proven on a class basis, since those cases turned upon their

individual facts, rather than upon a rule of law precluding common proof of fact of damage. See, e.g., *Shumate & Co., Inc. v. National Association of Securities Dealers, Inc.*, 509 F.2d 147, 155 (5th Cir.), cert. denied, 423 U.S. 868 (1975); *In Re Hotel Telephone Charges*, 500 F.2d 86, 89 (9th Cir. 1974). On the other hand, it has been recognized that fact of damage can be proven on a common basis. See, e.g., *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 60, 67-68 (D. N.J. 1971); *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 281, 287 (S.D. N.Y. 1971); *Developments, Class Actions*, 89 Harv. L. Rev. 1318, 1513n. 301. See generally *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295, 327 (N.D. Cal. 1971).

The method by which loss will be proven may depend upon the type of violation involved and its impact on plaintiff's business or property. For example, if anticompetitive practices result in the destruction of plaintiff's business, he may recover as damages lost profits or the going concern value of the business. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). If, however, defendants supply an article at supracompetitive prices, plaintiff may recover the amount of the illegal overcharge. See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 487-90 (1968). When plaintiff elects to prove damages on the basis of lost profits or going concern value, it would seem that his proof necessarily would focus on the operation of his business. But, if plaintiff seeks to establish payment of an illegal overcharge, the nature of proof may well be different.

If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price. If the price structure in the industry is such that nationwide the conspiratorially af-

fected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage. "[The] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by . . . proof of some damage flowing from the unlawful conspiracy. . . ." *Zenith Radio, supra*, 395 U.S. at 114. Under these circumstances, proof on a common basis would be appropriate. Even if the variation in price dynamics among regions or marketing areas were such that in certain areas the free market price would be no lower than the conspiratorially affected price, it might be possible to designate subclasses to conform with these variations. See *In Re Antibiotic Antitrust Actions, supra*, 333 F. Supp. at 281.

Since in this case neither the parties nor the district court focused upon the issues which would determine whether fact of damage may be proven on a class basis, we think the matter should be reconsidered by the district court in light of this opinion. If the district court should conclude that fact of damage cannot be proven on a class basis, it should also consider the problem, which we noted but did not reach in *Link v. Mercedes Benz of North America, Inc.*, 550 F.2d 860 (3d Cir. 1977) (in banc), of whether it may and should bifurcate the trial between violation before one jury and fact of damage and damages before another. See 550 F.2d at 874-78 (Gibbons, J. dissenting); *Windham v. American Brands, Inc.*, 539 F.2d 1016 (4th Cir. 1976), reargued in banc Feb. 14, 1977.

6. Damages

As we have already indicated, plaintiffs could elect to prove damages on the basis of an illegal overcharge rather than by proving a loss of net profits as the district court thought would be required.

The district court also thought that plaintiffs' proof of damages would be subject to the defense that, due to competition at the retail level, any lower wholesale price which would have obtained under a competitive wholesale market would be passed on to the consumer, leaving the dealer no better off. This fact, it thought, would require complicated and varying proof of local market conditions to prove loss of profit. The court is indeed correct that such an inquiry would be enormously complicated, posing a tremendous burden on the presentation of plaintiffs' case. But it is precisely for this reason that the Supreme Court eliminated the "passing-on defense" in *Hanover Shoe, Inc.*, *supra* at 491-494, a holding which it reaffirmed recently in *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611 (U.S. June 9, 1977).

With respect to the calculation of the amounts of damages, it would be necessary for each member of the class individually to prove the quantity of gasoline purchased at supracompetitive prices and the price paid. Nevertheless, it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate. *E.g.*, *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 457 (E.D. Pa. 1968); *Dolgow v. Anderson*, 43 F.R.D. 472, 490-91 (E.D. N.Y. 1968). If for any reason the district court were to conclude that there would be problems involved in proving damages which would outweigh the advantages of class certification, it should give appropriate consideration to certification of a class limited to the determination of liability. *See* Rule 23(c)(4)(A).

C. Comparative Fairness and Efficiency Criteria

The district court's reasons for concluding that a class action would not be superior to the prosecution of numerous individual suits appear at 68 F.R.D. at 139-40. Although we are convinced that each is erroneous, we do not

feel compelled to address them individually. Suffice it to say that our disagreement with each is both complete and fundamental. There is one point which bears comment, however. Without explaining the basis for its opinion, the court concluded that compliance with the notice provision presented significant problems of manageability. Plaintiffs proposed that individual notice be sent to each current lessee along with regular correspondence regularly sent by the defendants to their dealers. We think this proposal fair, efficient, fulfilling of the purposes of the rule and readily controllable by the court.

With respect to former lessees, however, plaintiffs proposed notice by publication in trade journals. If the names and addresses may be ascertained through reasonable effort, regardless of expense, plaintiffs must bear the cost of individual notice to every proposed member of the class. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 157 (1974). If plaintiffs indicate that they are unable or unwilling to bear this expense, the class certification, if granted, must be limited to current lessees. But even if the former lessees are retained in the class, we do not, at this point, perceive that the mechanics of providing notice will present insuperable management problems for the court. The court, may, we think, direct and supervise the mechanics of providing notice without directly performing them. *See* 3B *Moore supra* at Paras. 23.45[4.-4], 23.55.

D. Class Action Issues: Conclusion

We conclude that the district court erred in identification of the issues which are common to the class. As we have indicated, all of the issues necessary to determine violation and, possibly the determination of the fact of damage as well, are, under established legal principles, common and triable on a class basis. We further conclude that the district court erred in evaluating the comparative fairness and efficiency criteria in making its finding of the superiority *vel non* of maintaining the action on a class basis.

The judgments of the district court will be vacated and the cases remanded for further proceedings consistent with this opinion. The order refusing class certification will be vacated and the cases remanded for reconsideration in the light of this opinion.

ALDISERT, *Circuit Judge*, dissenting.

I agree with the majority that this court has jurisdiction of the appeal under 28 U.S.C. § 1291 and Rule 54(b), F.R. Civ. P., and that the plaintiffs have standing to sue non-lessors under §§ 4 and 16 of the Clayton Act. At that point, however, I part company with my brothers. In my view, the decision of the district court holding that plaintiffs have failed to state a claim under § 1 of the Sherman Act should be affirmed, as should its decision denying class certification.

I.

A.

My first, and most fundamental, disagreement with the majority concerns the role of pleading and discovery in this kind of litigation. The majority says that a "complaint is much too blunt an instrument with which to forge fundamental policies." But, if a complaint cannot even be depended on to state the essential theory of the litigation, I do not know how a court can correctly resolve the particular case, much less forge fundamental policies. This is not a *pro se* case. Plaintiffs' counsel are competent, experienced and, in fact, nationally renowned attorneys in the antitrust field. Nor is this a case that was hastily terminated by summary judgment. The original complaints were filed in 1971, the Bogosian complaint was amended in 1972, and both complaints were amended in 1973. Now, six years after the action was commenced, the majority remarks that it is "unwilling to speculate at this

stage as to the plaintiffs' theory." In my view, this case has long since passed the stage where anyone concerned—parties, lawyers, or judges—should have to speculate as to the theory of the litigation.

The majority's precise holding is that "the ruling that the specific allegation of interdependent consciously parallel action made here fails to state a claim should be vacated so that the issue can be decided, if necessary, after the relevant facts are fully developed." This is jurisprudential anarchy. Although the majority purports to act in the interest of efficient judicial administration, I fail to see how that interest is served by allowing what probably will be massive discovery prior to deciding whether the basic theory of the action is legally viable. The relevant facts should be fully developed after it is determined whether the claim is legally sufficient, not while that issue is still in doubt. Moreover, until the theory of the case is settled, it will not be known which are the "relevant" facts. Facts are only relevant insofar as they support a valid legal theory.

A motion to dismiss or for summary judgment for failure to state a claim seeks to obviate the necessity for time-consuming and expensive discovery in cases where the facts are irrelevant because no legal claim has been stated. Requiring discovery as a predicate to deciding such a motion defeats the very purpose of the motion. Although the majority says that further factual development will help to test the legal theory, I do not think that is the case here. The question is whether an allegation of interdependent consciously parallel action states a Sherman Act claim. Either it does or it does not. That may be a sophisticated question, but it is a question of policy, not of fact. The kind of adjudicative facts which will be developed by discovery in a particular case concerning particular plaintiffs and defendants in a particular industry will be of no help whatsoever.

I accept the principle that summary judgment is to be sparingly granted in complex antitrust cases. Primarily, this applies to cases where a cognizable claim has been stated and the question is whether there are disputed material issues of fact. I do not understand the principle as undermining the utility of pre-trial motions to test the sufficiency of a complaint. The Federal Rules require that a complaint make a "short and plain statement of the claim showing that the pleader is entitled to relief." F.R. Civ. P. 8(a).

Federal procedure relies on notice pleading rather than fact pleading, but at a minimum, as explained by the Advisory Committee on Civil Rules in October, 1955, the pleader is required "to disclose adequate information as the basis of his claim for relief". 2A J. Moore, *Federal Practice* ¶8.01[3] (3d ed. 1974). *Casley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80 (1957), teaches that "the defendant [be given] fair notice of what the plaintiff's claim is and the grounds upon which it rests," (emphasis supplied), and we have recently reiterated that the defendant is entitled to "fair notice of the claim asserted." *Joiner Systems, Inc. v. AVM Corp.*, 517 F.2d 45, 47 (3d Cir. 1975).

Universe Tankships, Inc. v. United States, 528 F.2d 73, 75-76 (3d Cir. 1975). In massive and protracted cases like this, the attorneys bear a particularly heavy responsibility to narrow and simplify the issues as soon as possible. Where, after six years, it is still possible to speculate as to the exact nature of the claim asserted, then I think it is time for the district court to do its best in grasping the essential intentment of the complaint and, if no claim is stated, to dismiss or grant summary judgment for failure to state a claim. That is exactly what the district court did, and I would affirm its action.

B.

My reading of the complaint differs from the majority's. After two or three amendments by skilled counsel, I think it is time to take the words of the complaint for what they actually say. By amendment to their complaint and pursuant to what the district court termed a "deliberately employed strategy", 393 F. Supp. 1046, 1048 n.5, plaintiffs' counsel deleted their allegations of conspiracy and substituted allegations of "interdependent consciously parallel action". As the majority correctly notes, plaintiffs were not required to plead evidence. They did not do so. They did not allege that a contract, combination or conspiracy existed and that it would be proven by evidence of interdependent consciously parallel action. Rather, they alleged that defendants had engaged in interdependent consciously parallel action in violation of §1 of the Sherman Act. Even construing paragraphs 13, 14, 16, 17 and 18 of the second amended complaint most favorably to the plaintiffs, it alleges that interdependent consciously parallel action is a "combination" for Sherman Act purposes. And that is just not so.

It is well settled, and indeed it is not here disputed, that conscious parallelism is not a violation of §1 of the Sherman Act. *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), cert. denied, 369 U.S. 839 (1962). The leading case, *Theater Enterprises*, explains:

The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. *Interstate Circuit, Inc. v. United States*, 306

U.S. 208 (1939); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.

346 U.S. at 540-41. From this, it is clear to me that consciously parallel behavior is admissible as circumstantial evidence of a properly pleaded contract, combination or conspiracy. That is the point that was implicated in *Vencie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309 (3d Cir. 1975). In *Vencie*, we specifically noted that the plaintiffs "relied on . . . circumstantial evidence . . . as proof of agreement. Their evidence does not, however, include two elements generally considered critical in establishing conspiracy from evidence of parallel business behavior . . ." *Id.* at 1314. *Vencie* was an appeal from an order granting a defendants' motion for judgment n.o.v. As such, it was our obligation to review the plaintiffs' evidence, and we concluded that they had not met their burden of proving conspiracy. This, however, is not an appeal from a judgment n.o.v., it is an appeal from a summary judgment for failure to state a claim. We are faced, not with a question of evidence, but with a question of pleading.

As it is clear from *Theater Enterprises* that consciously parallel behavior may be circumstantial evidence of an agreement, so also is it clear that consciously parallel behavior alone does not violate the Sherman Act. And, therefore, an allegation of consciously parallel behavior, without more, would not state a Sherman Act claim. But, if an allegation of consciously parallel behavior is legally insufficient, I am unable to see how an additional allegation of interdependence cures the insufficiency.

If there is anything in this case that bearkens back to "magic words", it is not, as the majority suggests, the requirement that a Sherman Act complaint allege concerted action of some kind. It is, rather, the asserted power of the word "interdependent" to breathe vitality into a lifeless theory of recovery. Nowhere has the talismanic character of that word been explained to my satisfaction. Indeed, it seems to me that interdependence is implicit in the notion of conscious parallelism and that the added word is hardly more than a redundancy. In the usual situation of parallel business behavior, a businessman is conscious of what his competitor is doing and his action, or inaction, depends on what the competitor does. This is not a violation of the antitrust laws; it is, in fact, the essence of the competitive behavior that those laws seek to promote. Because his competitor takes the same attitude toward him, the two businessmen are mutually conscious of each other and their actions are "interdependent". In a concentrated industry, such mutually conscious and interdependent conduct by several competitors may have anti-competitive effects. But it is not necessarily collusive, and I cannot understand how a proliferation of descriptive words changes the legal status of the conduct. Until there is a contract, combination or conspiracy, in restraint of trade, there is no § 1 violation. As the Supreme Court observed in *Theater Enterprises*: "Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." 346 U.S. at 541 (footnote omitted).

In their brief in this court, plaintiffs rely primarily on *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), and *Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, CCH Tr. Reg. Rptr. ¶ 60,216 (2d Cir. 1975). Based on these decisions, they say "it is clear that [the courts] have uniformly held

that proof of interdependent conscious parallel action, while not conclusive proof of a Section 1 Sherman Act violation, is sufficient to support a finding of violation." Appellants' Brief at 21. In my view, it is not necessary to agree or disagree with that reading of the cases in order to affirm the summary judgment here.

Like the majority, the plaintiffs have mistaken an issue of pleading for an issue of evidence. We are not presented with a situation where interdependent consciously parallel action—however that may differ from merely consciously parallel action—has been introduced as evidence of a properly pleaded contract, combination or conspiracy. Nor are we presented with the issue whether such evidence alone would be sufficient to support a finding of concerted action. Instead, we are presented with the pure question of law whether an allegation of interdependent consciously parallel action, without more, states a claim under § 1 of the Sherman Act. In my view, it does not. As no amount of discovery can cure a complaint that fails to state a claim, I would affirm the entry of summary judgment.

II

Having said initially that it is "unwilling to speculate at this stage as to the plaintiffs' theory," the majority proceeds to "identify in greater depth the nature of the claims" and to conclude that the district court erred in denying class certification. For purposes of summary judgment, apparently, the exact theory of the case remains foggy to the majority, but for purposes of class action determination the detailed elements of the claim have become pellucid. If the exact nature of the legal theory is clear, then the case is ripe for a test of whether a claim has been stated. If the legal theory is not clear, then the question of class certification ought to abide the clarification of the issues.

This is not an ordinary class action. Plaintiffs do not seek to form a class of all Exxon dealers, or all Gulf dealers, or all Texaco dealers. They seek to form a truly titanic class of all present and former lessee gasoline dealers of 15 different oil companies. The only limitation on the class is that the dealers be located in areas having a population over 15,000. At the very least, the size and diversity of the asserted class raise serious questions about the propriety of class action treatment. Moreover, the members of the class are not consumers with individually small or de minimis claims. Nor are the class members persons who have been deprived of non-quantifiable civil rights. The class members are businessmen, more or less sophisticated, with significant and definite financial interests in the litigation. This is not, therefore, a case where it would be economically impractical to prosecute individual actions.

A.

The majority has concluded that the district court erred when it found that common questions would not predominate over individual ones, as required by Rule 23(b)(3). I disagree. Rather than paraphrasing, I prefer the exact language concerning our review of a predominance finding as stated in *Katz*:

If the district court has properly identified the issues common and diverse, we would undoubtedly defer in most instances to its conclusion as to predominance, since that requirement relates to the conservation of litigation effort, and the trial court's judgment probably will be as good as ours. If the district court has applied the correct criteria to the facts of the case, then, it is fair to say that we will ordinarily defer to its exercise of discretion.

Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.), cert. denied, 419 U.S. 885 (1974). The majority's analysis,

in my opinion, pays no more than lip service to the discretion which a district court must have in evaluating the propriety of class certification in such a massive proceeding as this.

The majority says that the district court erred in identifying the issues which are common to the class. This is not to say that the district court, in its thorough treatment, failed to identify any issues in the case. Rather, this is a euphemistic way of indicating that the majority disagrees with the district court's decision to require individualized proof on certain issues. I believe that the judicial structuring of the proof, especially in a complicated proceeding like this one, lies necessarily and unalterably within the discretion of the district court. Not only do I find no abuse of that discretion, but, on most points, my own analysis would track the district court's quite closely.

Concerning the lease claim, the majority correctly states that "[t]here is no single lease provision which requires that the lessee purchase all gasoline from his lessor." It goes on to say, also correctly, that it is a "constellation of lease provisions" which allegedly have the practical economic effect of tying the purchase of gasoline to the lease of the service station. Then, having admitted that whether the lessee realistically could sell other brands of gasoline is a "question of fact which can be developed by expert testimony concerning the relative costs and benefits of [installing the lessee's own pumps and tanks]," the majority nevertheless concludes that the practical economic effect of the various lease provisions would present a common question, provable by common proof. Even if there were only one defendant oil company and only one form contract, the practical economic effect would vary from dealer to dealer, city to city, and region to region. It might, for example, be economically feasible for a large volume dealer in a large city to install his own pumps and

tanks while it might not be feasible for a smaller dealer in a smaller city to do so. Here there are more than a dozen oil companies, with operations concentrated in different regions of the country, and there are more than 400 different forms of contracts and agreements. *A fortiori*, the practical economic effects of the agreements will present diverse questions.

The question of market power in the tying product, leaseholds, will similarly present diverse, not common, questions. The majority asserts that market power could be demonstrated by showing that "defendants controlled a majority of existing service stations and that because zoning restrictions and high capital costs make development of new stations difficult, the defendants have sufficient market dominance over existing stations to impose a tie-in." I have at least two serious problems with this line of reasoning. To begin with, I have no doubt that plaintiffs could show that defendants control a majority of existing stations. This follows almost tautologically from the fact that plaintiffs have named as defendants most of the major companies in a concentrated industry. This element of proof can be satisfied in any reasonably concentrated industry simply by naming enough defendants. Secondly, I fail to see how zoning restrictions and capital costs could be established by common proof. Certainly zoning laws vary from city to city, and I have no doubt that the capital costs of developing a station do also.

The majority concedes that the quantum of damages would have to be individually established. But it finds "nothing in this record which persuades us" that the fact of damage would have to be individually proven, and directs the district court to reconsider the matter in light of the majority's opinion. Although I agree with the majority that the propriety of proving the fact of damage on a common basis depends on the circumstances of the case, I find nothing in this record which persuades me that the

fact of damage would *not* have to be individually proven. There is no reason why there might not be dealerships which suffered no damage at all as a result of defendants' conduct, be it legal or illegal. As the majority observes, it is possible that "in certain areas the free market price would be no lower than the conspiratorially affected price." For me, however, the issue is of little importance as I would not upset the district court's predominance finding even if the fact of damage were a common question.

I do not dispute the fact that there may be common questions. For example, if a conspiracy had been alleged, that would present a common question subject to the same proof whether made on behalf of one plaintiff or a thousand. But the fundamental issue is not the existence of common questions, it is whether the district court abused its discretion in concluding that common questions would not predominate. This is not simply a matter of numbering the questions in the case, labelling them as common or diverse, and then counting up. It involves a sophisticated and necessarily judgmental appraisal of the future course of the litigation, as well as an evaluation of the most efficient means of proving the claims and the time that will be consumed by each aspect of the proof. The district court is in a position to do that; we are not.

In my opinion, the district court made no significant error in identifying the issues as common or diverse, it correctly applied the criteria of Rule 23 to the facts, and it clearly did not abuse its discretion in concluding that common questions would not predominate in this colossal but intricate proceeding.

B.

The majority has also concluded that the District court's reasons for finding the class action not to be superior to other adjudicative vehicles were "erroneous".

Again, *Katz* articulates the standard of review of a finding on the issue of superiority: "[O]ur review looks first at whether the district court properly applied the relevant criteria to the facts of the case. If this has been done it is fair to say that we will ordinarily defer to its exercise of discretion." 496 F.2d at 757.

In this case the district court not only made the ultimate finding of lack of superiority, it expressly applied the subsidiary criteria, which the rule suggests as pertinent, to the facts. It found a significant class member interest in individually controlling separate actions which, as I have indicated, would not necessarily be impractical. It found that disparate factual considerations made concentration of the litigation in one forum not desirable or advantageous. And it found that management of the action would present "enormous difficulties." 62 F.R.D. at 140. We have previously observed that the question of manageability of a class is largely a factual question and that the district court has a "wide range of discretion" in the matter. *Link v. Mercedes Benz*, 550 F.2d 860, 864 (3d Cir. 1977) (plurality opinion); see *Neely v. United States*, 546 F.2d 1059, 1069 (3d Cir. 1976).

If, for some reason, this case falls outside of the *Katz* promise "ordinarily" to defer to the district court's exercise of discretion, that reason is not stated by the majority. Nor am I aware of any reason why this case requires such a departure from settled precepts. I would hold that the district court properly applied the relevant criteria to the facts of the case, and that its finding on the question of superiority was well within the wide range of discretion which it had.

If the district court saw fit to reconsider its class action decision at a later point in the litigation, that would be within its power under Rule 23(c)(1). But I can see

no basis at present for upsetting its denial of the class certification, and I would, therefore, affirm that denial.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title Omitted]

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on March 28, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered December 19, 1973, April 15, 1975, June 2, 1975 and June 26, 1975, be, and the same are hereby vacated and the causes remanded for further proceedings in accordance with the opinion of this Court.

ATTEST:

/s/ Thomas F. Quinn
Clerk

July 21, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title Omitted]

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT and GIBBINS, *Circuit Judges*.

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Aldisert would grant rehearing in the above captioned matters.

By the Court,

/s/ Seitz
Chief Judge

Dated: August 25, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1137

PAUL J. BOGOSIAN,
Plaintiff,

v.

GULF OIL CORPORATION, ET AL.,
Defendants.

Civil Action No. 71-2543

LOUIS J. PARISI,
Plaintiff,

v.

GULF OIL CORPORATION, ET AL.,
Defendants.

MEMORANDUM OPINION AND ORDER

VANARTSDALEN, J.

April 15, 1975

These are private antitrust actions¹ brought under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. The lawsuits, since their inception in 1971, have been refined so that they are premised solely upon an alleged illegal tie-in under § 1 of the Sherman Act,² 15 U.S.C. § 1. Plaintiffs contend that the defendants, major oil companies,

¹ These are two separate and independent actions which have not been formally consolidated for trial but are being treated together for purposes of discovery and pretrial motions.

² Claims involving real estate monopoly and the tying of TBA products have been abandoned.

as landowner-lessors impose illegal tie-in agreements in the leasing of their respective service stations by requiring the lessees to buy and sell only the gasoline supplied by their respective lessors.

Bogosian v. Gulf Oil Corp., 62 F.R.D. 124, 127 (E.D. Pa. 1973).

Paul J. Bogosian operated a Gulf station as lessee of the Gulf Oil Corporation and Louis J. Parisi operated an Exxon station as lessee of Exxon Corporation. Plaintiffs originally sought to proceed as representatives of a nationwide class of service station dealers who leased stations from any of the oil company defendants. On December 19, 1973, this court denied class certification, 62 F.R.D. 124 (E.D. Pa. 1973), and plaintiffs have proceeded against the named defendants, other than their respective lessors, solely under a theory that all defendants acted "through a course of interdependent consciously parallel action." [Amended Complaints ¶ 14].

For plaintiffs to succeed against those defendants who are not their lessors, it must be shown that the defendants acted in concert. The Sherman Act § 1 requires a "contract, combination . . . or conspiracy, in restraint of trade."⁸ While as between Bogosian, the lessee, and Gulf, the lessor, a contract exists—as between Bogosian and Getty, Shell or Exxon the same relationship does not exist.⁹ Consequently, a "contract, combination or con-

⁸ It is hornbook law that individual action does not violate Sherman Act § 1. The statute clearly requires concerted action in the form of a contract, combination or conspiracy in restraint of trade. As an example, this concerted action could take the form of a vertical tie-in contract between a buyer and seller or a horizontal combination or conspiracy among competitors. Thus, as between a lessor and lessee a contract would exist. But where this relationship does not exist, concerted action must be shown another way—such as through an agreement among suppliers or lessors.

⁹ As for Parisi, the lessee, a contract exists with Exxon, the lessor, while as with Getty and Shell no such relationship exists.

spiracy" must be shown by another means, to come within the statutory confines of the Sherman Act § 1.

In the instant action the plaintiffs do not presently allege either a contract or a conspiracy. Instead they contend that "interdependent consciously parallel action" satisfies the Sherman Act § 1 requirement of concerted action.¹⁰

Presently before the court are motions for summary judgment against both Bogosian and Parisi by Getty, Shell and Exxon. At the outset, it should be noted that antitrust litigation is not usually suited to summary disposition. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). This is due to the complexity of the factual issues as they may reflect motive or intent. *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *Moore v. Jas. H. Matthews & Co.*, 473 F.2d 328 (9th Cir. 1973); *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323 (8th Cir. 1973); *Booth Bottling Co., Inc. v. Beverages International, Inc.*, 361 F. Supp. 340 (E.D. Pa. 1973); *MDC Data Centers, Inc. v. International Business Machines Corp.*, 342 F. Supp. 502 (E.D. Pa. 1972).

GETTY AND SHELL

Getty and Shell moved for summary judgment under the following theories:

(1) The complaints are not sufficient to state a cause of action under Sherman Act § 1 against Getty and Shell as non-suppliers since no "conspiracy" is alleged.

(2) Plaintiffs lack standing under § 4 Clayton Act, since in their depositions, plaintiffs individually

¹⁰ This is hardly accidental. Messrs. Brown and Berger are experienced and learned attorneys in the field of antitrust litigation. Rather than inadvertence, the use of "interdependent conscious parallelism" is a deliberately employed strategy.

state that Getty and Shell did not injure them personally in any way.

(3) Plaintiffs lack standing under § 16 Clayton Act, because they do not face an imminent threat of harm from Getty and Shell.

The Supreme Court has recognized that a Sherman Act § 1 conspiracy may be proven without a formal agreement. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). As a consequence courts have looked to the conduct of the defendants, which would be sufficient to prove the conspiracy. *United States v. General Motors Corp.*, 384 U.S. 127, 143 (1966); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 193 (1963); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 202 (3d Cir. 1961); *William Goldman Theatres v. Loew's, Inc.*, 150 F.2d 738, 743 (3d Cir. 1945); *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610, 622 (E.D. Pa. 1974); *Overseas Motors, Inc. v. Import Motor Limited, Inc.*, 375 F. Supp. 499, 531 (E.D. Mich. 1974); *A. P. Hopkins v. Studebaker Corp., Onan Div.*, 355 F. Supp. 816, 826-27 (E.D. Mich. 1973), *aff'd*, 496 F.2d 969 (6th Cir. 1974); *Fiumara v. Texaco, Inc.*, 204 F. Supp. 544, 548 (E.D. Pa.), *aff'd*, 310 F.2d 737 (3d Cir. 1962).

The courts, however, have repeatedly held that mere conscious parallelism, viz., knowingly engaging in parallel business activity by and among competitors, standing alone, is insufficient to support a conspiracy allegation under Sherman Act, § 1. *Theatre Enterprises v. Paramount Film Distributing Corp.*, *supra* at 541; *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d

Cir. 1963); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, *supra*; *Lawlor v. National Screen Service Corp.*, 270 F.2d 146, 155 (3d Cir. 1959); *Overseas Motors, Inc. v. Import Motors, Ltd., Inc.*, *supra* at 531.

Plaintiffs contend that interdependent consciously parallel action is different from mere conscious parallel action and supports a Sherman Act § 1 cause of action under the doctrine of *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971).

Rather than merely alleging "conscious parallelism" as defendants seem to infer, the complaints allege significantly more. The complete phrase utilized by plaintiffs is "interdependent consciously parallel action," (paragraph 14), which obviously is not the same as mere "conscious parallelism."

Plaintiffs "Supplemental Memorandum Sur Summary Judgment", p. 1-2. Plaintiffs further assert that summary judgment should not be granted since additional discovery is required, and have so moved under Rule 56(f), Fed. R. Civ. P. Because the complaint fails, as a matter of law, to state a cause of action under Sherman Act § 1 against Getty and Shell, summary judgment will be granted* and plaintiffs' Rule 56(f) motion will be denied.

* Summary judgment will be granted solely on a question of law. No facts are in dispute. The caveats of *Poller*, *supra* at 473; viz., difficulty in proof of conspiracy, motive or intent are inapplicable. Cf., *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Goldinger v. Boron Oil Co.*, 375 F. Supp. 400, 412 (W.D. Pa. 1974); *Cal. Distributing Co. v. Bay Distributors, Inc.*, 337 F. Supp. 1154, 1161 (M.D. Fla. 1971); *Record Club of America, Inc. v. Columbia Broadcasting System, Inc.*, 310 F. Supp. 1241, 1245-46 (E.D. Pa. 1970). Not only is it proper to use summary judgment to resolve questions of law, *National Bank of Commerce of San Antonio v. United States*, 369 F. Supp. 990 (W.D. Tex. 1973), *aff'd*, 491 F.2d 1271 (5th Cir. 1974), but courts should not flinch from their duty to decide a legal issue on summary judgment simply because as here, the legal issue may be difficult or uncertain. *Housing Authority of*

The sole issue to be determined is whether an allegation of "interdependent consciously parallel action" in a complaint is an adequate allegation of a "contract combination or conspiracy" as required by Sherman Act § 1.⁹ Conscious parallelism usually arises in the context of sufficiency of the evidence in a Sherman Act § 1 trial in which a conspiracy or combination^{*} had been alleged. The focus is whether evidence of conspiracy from proof of conscious parallelism together with all other evidence is adequate to support a factual finding of a conspiracy. In the instant case, however, the focus is quite different—whether pleading no more than interdependent consciously parallel action is sufficient to support a claim under Sherman Act § 1 which requires concerted action in the form of a contract, combination or conspiracy. A complaint with broad and virtually conclusory allegations of conspiracy could be sufficient at this stage of proceedings. Cf., *Brett v. First Federal Savings and Loan Ass'n*, 461 F.2d 1155, 1158 (5th Cir. 1972). Because mere conscious parallelism cannot sustain a Sherman Act § 1 violation, *a fortiori*, the use of that phrase in a pleading without more is insufficient. The critical factor is that Sherman Act § 1 requires concerted action. Certainly, this is not to

Omaha, Neb. v. United States Housing Authority, 54 FRD 402, 404 (D. Neb. 1972), *rev'd on other grounds*, 468 F.2d 1 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *Perfect Photo Inc. v. Sentiff*, 205 F. Supp. 574, 575 (E.D. Pa. 1962).

⁹ It is arguable that the standing issues are threshold questions and should be answered first. However, I find that these theories propounded by Getty and Shell would not justify summary judgment. I do not consider the deposition testimony of plaintiffs concerning a conclusion of law to be dispositive. Moreover, plaintiffs would not be expected to understand the legal ramifications or even be aware of the activities of the defendants which may have injured them. Their deposition testimony, therefore, to the effect that they were "not harmed in any way" or they had "no complaint" against Getty or Shell is inconclusive.

^{*} Hereafter when concerted action in the form of conspiracy or combination is referred to, only the word conspiracy will be used.

suggest a revival of the "magic words" and shibboleths of common law pleading⁹ "when the slightest deviation from the recognized formula was fatal." 3 T. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY*, 26 (1906). Fed. R. Civ. P. mandates an enlightened approach to pleadings. However, it is beyond question that a plaintiff must set out a cause of action in a complaint.¹⁰ A plaintiff is not deprived of a day in federal court merely because of nomenclature. In the instant case the plaintiffs have deliberately chosen to place all of their "concerted action" claims under the rubric of "interdependent consciously parallel action" and this phrase fails to satisfy the Sherman Act § 1.

Plaintiffs rely most heavily on *Wall Products v. National Gypsum*, *supra*, for the proposition that evidence of interdependent consciously parallel action is sufficient to support a Sherman Act § 1 claim.¹¹ *Wall Products* was a private antitrust action which alleged price fixing. The court was faced with a situation wherein the major manufacturers of wallboard followed the actions of their competitor, United States Gypsum (USG) which had withdrawn all price exceptions. It had been the practice of the major producers in the wallboard industry to publish a price list but to make exceptions to meet price competition which was usually engendered by smaller, single plant producers of wallboard. In order to stop this downward price mechanism, USG decided upon a six point program: (1) stop discounting wallboard, (2) sell only at the pub-

⁹ See 5 WRIGHT AND MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202.

¹⁰ Fed. R. Civ. P. 8(a)(2).

¹¹ Plaintiffs have also cited *Moore v. Matthews & Co.*, *supra*, a case involving both tying and parallelism. *Moore* is distinguishable. In that case defendants engaged in a tie-in as a response an invitation to conspire. Thus the invitation to conspire and the response to so engage in a tie-in supported a Sherman Act § 1 violation without regard to interdependent conscious parallelism.

lished list price, (3) announce this in the Wall Street Journal, (4) ignore competition from single plant producers, (5) centralize price authority—not delegate authority to except prices, (6) determine existing commitments to sell at lower than list and fulfill only those.

Because wallboard is fungible with virtually no differences between brands, USG realized that its plan would succeed if, and only if, the other major producers embarked upon a similar strategy. USG computed that it would realize a gross loss of \$8.8 million due to customer dissatisfaction which would be offset by a gross gain of \$10.6 million due to the checking of price erosion for a net gain of \$1.8 million. Any net gain would be contingent upon all the major competitors following the lead of USG. If only USG pursued a policy of no price exceptions the market structure was such that its customers would buy elsewhere. The projected loss of \$8.8 million would, therefore, be the bare minimum. The crucial factor for success, then, was interdependent parallel action by competitors. If these were the only facts in *Wall Products* in which a Sherman Act § 1 violation was found, then that opinion and the term interdependent consciously parallel action would have great significance. Such is not the case. When USG announced its policy, it did not make a public announcement in the WALL STREET JOURNAL and much more critically the public announcement, it did make, did not include these two crucial factors—ignoring competition from single plant producers and centralizing pricing authority. The court found that single plant producers of wallboard had necessitated the price exception policy. Thus, ignoring price competition from the single plant products was the *sine qua non* of the policy. The policies of the other major producers all contained these two unannounced, but essential factors. This anomaly alone could have furnished sufficient evidence to support a finding that some understanding existed between the major producers. Moreover, there was evidence that USG

actually had talks concerning price exceptions with other major producers—National Gypsum and Kaiser Industries.¹² Thus, while Judge Zirpoli's language did seem to indicate that proof of interdependent conscious parallelism, without anything more, could be sufficient evidence to support a Sherman Act § 1 violation,¹³ in *Wall Products*, a classic Sherman Act § 1 combination, contract or conspiracy could be found without resorting to interdependent conscious parallel action.

While interdependent conscious parallel action was not necessary to establish a Sherman Act § 1 violation in the factual setting of *Wall Products*, the policy and rationale behind that concept warrants discussion. Judge Zirpoli made this statement.

In an industry composed of few sellers of a homogeneous product, when the major competitive sellers engage in policies and practices which have for their objective the stopping of declining prices and deviations from terms of sale and when those policies and practices are parallel in detail . . . and are so interdependent that adherence thereto on the part of *all* such major competitors is essential to the achievement of their objective, such interdependent conscious parallel action may well constitute a tacit understand-

¹² In the opinion, Judge Zirpoli alludes to this fact although he does so in the converse:

While there is circumstantial evidence from which one might infer that National had such advance notice, [of the USG price exception policy], failure to establish such advance notice is not fatal to plaintiffs' claim that defendants were actively participating in an agreement or conspiracy to fix or stabilize prices. [citation omitted].

326 F. Supp. at 316.

¹³ "[S]uch interdependent conscious parallel action *may well* constitute a tacit understanding. . . .

326 F. Supp. at 316. (emphasis added).

ing by "acquiescence . . . coupled with assistance" to effectuate a price fixing agreement. [citation omitted].

326 F. Supp. at 316.

Judge Zirpoli reasoned that interdependence was the critical factor in *Wall Products*. He explicitly found more "than mere conscious parallelism."

In *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), the Supreme Court upheld a finding of a Sherman Act § 1 violation from a factual pattern which outwardly resembled interdependent conscious parallelism. Commencing in 1932, R. J. Reynolds (RJR) increased prices for one of its products, Camel cigarettes. These increases were invariably matched by RJR's major competitors, American Tobacco Company (ATC) and Liggett and Myers (L&M) for their brands which were similar to Camels. Because these increases took place in the midst of the great national depression of the 1930's, it is obvious that an increase by RJR would have been disastrous to it if ATC and/or L&M had undercut Camels by not matching the increases. Thus, interdependence was a crucial factor for the success of RJR's price increases. The tobacco companies countered the allegations of a conspiracy with the explanation that advertising expenses had increased thus necessitating any price increase. However, *American Tobacco* contained more than interdependent conscious parallelism. The court considered two other factors which were evidence of an illegal agreement. Not only had the defendants increased their prices simultaneously but they also attempted to monopolize¹⁴ by lower-

¹⁴ Of course, monopolization is a separate violation under Section 2 of the Sherman Act. 15 U.S.C. § 2. However, the fact that prices were later lowered by the defendants is another factor of circumstantial evidence pointing toward a conspiracy. Unlike a price increase, a price decrease could not be explained away by the increased cost of advertising expenses.

ing prices at a later date to drive out the less expensive brands produced by smaller competitors. In addition there was evidence that defendants were purchasing tobacco for each other.

The issue then becomes whether interdependence is sufficient to support a Sherman Act § 1 claim. In its usual context conscious parallelism or interdependent conscious parallelism is circumstantial evidence of conspiracy. While interdependent conscious parallelism may often be based upon agreement, such business behavior may be the result of rational individual decisions of competitors.¹⁵ The latter, if without any agreement, is not actionable.

While both *American Tobacco* and *Wall Products* contain an element of interdependent conscious parallelism, it is not the interdependence alone which converts mere conscious parallelism to a Sherman Act § 1 conspiracy. Rather, interdependence is merely additional circumstantial evidence or indicia of an agreement. Conscious parallelism has become a shorthand term for parallel business behavior where a Sherman Act § 1 violation is attempted to be proven without benefit of a formal agreement. It is not necessary to burden the language of antitrust law with another nonoperational term; viz., interdependent consciously parallel action.¹⁶ Instead, it is sufficient for the present analysis to state that I have found no decision,

¹⁵ TURNER, THE DEFINITION OF AGREEMENT UNDER THE SHERMAN ACT: CONSCIOUS PARALLELISM AND REFUSALS TO DEAL, 75 Harv. L. Rev. 655 663-73 (1962).

¹⁶ Because antitrust litigation is complex, it requires an appreciation of economics as well as a thoughtful application of the facts to the law. In this vein, it is dangerous to resort to labels and phrases as a substitute for analysis. It is not "conscious parallelism" and the addition of the word "interdependent" to that phrase which is meaningful. Rather, a factual analysis of cases is mandated. A useful opinion which has attempted to deal with facts and issues is *Overseas Motors Co. v. Import Motors, Ltd., Inc.*, *supra*.

reported or otherwise, which held that Sherman Act § 1 violation existed from facts which showed nothing more than parallel business behavior among competitors even where interdependence was necessary. Interdependence may add an important factor to parallel business behavior, but it alone is not dispositive of concerted action. Since the course of conduct alleged by plaintiffs is in and of itself insufficient to prove a Sherman Act § 1 violation, such an allegation standing alone is insufficient to state a claim.

In summary, my ruling is that a pleading alleging nothing more than interdependent consciously parallel action among competitors is an insufficient allegation of a "contract, combination or conspiracy" under a cause of action based on a violation of the Sherman Act, § 1.

EXXON

Exxon has moved for summary judgment against both Parisi and Bogosian. The motion will be granted as to the Bogosian action for the reasons stated *supra* on the Getty and Shell motions since Exxon is not the lessor of Bogosian. As the Parisi action, the motion will be denied.

Exxon has a two pronged attack in the Parisi motion:

(1) Parisi's claim against the defendant oil companies is based solely on a theory of concerted action; *viz.*, interdependent consciously parallel action. There are no individual claims by the plaintiff against an individual defendant. Because the theory under which the concerted action claim is brought is insufficient as a matter of law under Sherman Act § 1, there is no claim against Exxon.

(2) Parisi in his own deposition states that he was not compelled to buy Exxon gasoline—the alleged tied product, and he was not unhappy with Exxon gasoline.

Because I have held that as a matter of law the allegation of interdependent consciously parallel action in a complaint is insufficient to state a Sherman Act § 1 cause of action, the only issue left under Exxon's first theory is whether Parisi stated an individual claim against his lessor, Exxon. At the hearing on the class action motion on January 12, 1973, Mr. Berger made the following statement:

We are streamlining the cases in respect to the nature of the claim and the description of the class.

The single, solitary claim in this class action is as follows: The defendant franchisors acting in concert have maintained a uniform policy of requiring all those who lease, a sublease or renew such leases or sublease of defendants' service station to do the following things:

First, to license the use of defendant's trademark.

Second, to sell only the defendant's gasoline.

Third, not to sell gasoline purchased from any other sources under that trade name.

Fourth, to purchase all such gasoline at prices unilaterally and subjectively determined by the defendant franchisors from time to time.

That, Your Honor is our claim. All other claims, including those involving real estate monopoly and TBA products are abandoned.

(N.T. 32-33).

From this, Exxon argues that Parisi's sole claim is based upon concerted action. Using Mr. Berger's own words: "The single, solitary claim . . . is . . . the defendant franchisors acting in concert. . . . That, your honor is our claim . . . all other claims . . . are abandoned", it could be contended that any individual claims were abandoned in favor of claims of concerted action. Such an

interpretation, however, belies a fair reading of Mr. Berger's statement.¹⁷

Moreover, the actual amended complaint of May 21, 1973 clearly sets out an individual claim against Exxon. Relevant portions of the allegations of the complaint are as follows:

4. From July 1968 until June 1971, plaintiff operated an Exxon gasoline service station at Oxford Circle and Roosevelt Boulevard, Philadelphia, Pennsylvania, under a series of service station leases and contracts of sale with Exxon Corporation which were effective for time periods ranging from six months to usually no longer than one year.

5. Through the contracts and leases, the plaintiff was required to sell only gasoline bought from his defendant lessor, Exxon Corporation.

6. Upon information and belief, plaintiff alleges that the practice described in paragraphs 4 and 5 substantially represents and is typical of the general business practice of each of the named defendants with each of its lessee-dealers in the plaintiff class as described below.

.

11. Defendants are engaged in a national market and transport and sell petroleum products in interstate commerce.

12. Defendants have established lessee-dealerships by the use of the conditional lease methods described in paragraphs 4 and 5 herein. The defendants' leasing of service station sites, together with physical improvements, tanks and pumps, is conditioned upon the signing of contracts of sale or other contractual provisions for the exclusive purchase and sale of the

lessor's brand of gasoline. The lease is usually for a short period of time, and in most cases does not exceed one year. Lessee-dealers are supervised by District Managers and are personally supervised by Sales Representatives.

13. For many years past, the exact date being presently unknown to plaintiff, but at least as early as 1957, and continuing to the present, defendants, through a course of interdependent consciously parallel action, have required all dealers who lease, sublease, or renew such leases or subleases for one or more of defendants' service stations to:

- (a) license the use of the lessor's trademark;
- (b) sell only the lessor's gasoline; and
- (c) not sell gasoline purchased from any other source under the licensed trademark.

14. The leasing practices of the defendants, individually and collectively, through interdependent consciously parallel actions, as aforesaid, including the use of short-term leases, leases based on contracts for the sale of lessor's brand of gasoline and other contractual arrangements, have enabled the defendants to compel the lessee-dealers to purchase the lessor's brand of gasoline and not to purchase any other brand of gasoline for resale.

15. With the vast economic power and control possessed by the defendants individually and collectively over the leasing of service station sites, defendants have used the said tying practices substantially to restrain free competition in the market for the sale and purchase of gasoline by retail service station outlets. A substantial amount of interstate commerce has thereby been affected.

16. The unlawful acts of defendants as aforesaid constitute an unreasonable combination in restraint

¹⁷ The concerted action claim, in any case, encompasses an individual claim. *Cf., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968).

of interstate trade and commerce in the marketing of gasoline in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

As to its second theory, Exxon contends that Parisi's deposition testimony contradicts the requirements of *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974), that the victim of a tie-in be compelled to purchase the unwanted tied product. Exxon has read too much into *Olsten*. Even the quoted portion of the opinion in Exxon's brief (page 16) makes this clear.

[B]efore the plaintiff can become entitled to the benefit of the *per se* doctrine, and thereby escape the proof otherwise required to establish an undue or unreasonable restraint under the rule of reason approach it is basic that he first establish that he is an unwilling purchaser of an unwanted product.

Olsten, *supra* at 662.

Thus, if Parisi chooses not to rely on the *per se* rule,¹² but instead upon the rule of reason, *Olsten* has no application.

¹² If the plaintiff can show that the tying product has sufficient economic power to restrain free competition in the tied product and affects a not insubstantial amount of commerce, then the tie-in will be presumed illegal without an elaborate inquiry into the precise harm caused. *Fortner Enterprises, Inc. v. United States Steel Corp.*, *infra*, at 496-99; *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). On the other hand, if the plaintiff cannot meet the requirements for the *per se* rule, the case can still be decided under the rule of reason. Using the latter course, inquiry is made under the general standards of the Sherman Act with a thorough examination into the purposes and effects of the practices involved. *Fortner*, *supra* at 500. To be successful under the rule of reason the plaintiff must prove that the complained of practices are an unreasonable restraint on commerce and consequently have an anticompetitive effect. See, e.g., *United States v. Arnold, Schurinn & Co.*, 388 U.S. 365, 368 (1967); *Northern Pacific R. Co. v. United States*, *supra* at 5-6; *Worthington Bank & Trust Co. v. National Bank Americard, Inc.*, 485 F.2d 119, 125-26 (8th Cir. 1973).

The compulsion requirement of *Olsten* is merely evidence of the economic power of the tying product. By showing the victim of a tie-in to be the "unwilling purchaser of an unwanted product," the argument can be made that the economic power of the tying product enables it to restrain competition in the market of the tied products. The Supreme Court made clear in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500-503 (1969), that it only becomes necessary to show that the tying product has sufficient economic power to restrain free competition in the tied product and affects a not insubstantial amount of commerce if the plaintiff seeks to benefit from the *per se* rule. Thus, as *Fortner* held, it is inappropriate to grant summary judgment if the plaintiff merely fails to allege facts which, if proved would bring into operation the "*per se* rule." Moreover there are material facts in dispute which may establish the economic power necessary under the *per se* rule through compulsion.¹³ In any event, Parisi would still be free to prove his case under the rule of reason.

¹³ Exxon has alluded to passages in the depositions where Parisi stated that he did not attempt to buy gasoline elsewhere. From this Exxon assumes that neither was Parisi compelled nor Exxon gasoline unwanted. Such an inference of noncompulsion flies in the face of Parisi's statement that he was afraid of repercussions.

I wouldn't be around. I wouldn't be there long if I did that [attempt to purchase non Exxon gasoline for his station].

Parisi deposition p. 144.

If Parisi feared losing his station by purchasing gasoline other than Exxon, then coercion is manifest. Cf. *United States v. Arnold, Schurinn & Co.*, 388 U.S. 365, 372. (1967).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2543

LOUIS J. PARISI

v.

GULF OIL CORPORATION, ET AL.

ORDER

AND NOW, this 15th day of April 1975, the motions for summary judgment by defendants Getty and Shell are GRANTED. The motion for summary judgment by defendant Exxon is DENIED.

It is determined that the granting of summary judgment in favor of Getty and Shell is a final judgment and that no just reason exists for delay in this matter.

Therefore, it is certified under 28 U.S.C. § 1291 and Rule 54(b), Fed. R. Civ. P., that this is a final judgment as between the plaintiff and defendants Getty and Shell.

BY THE COURT:

/s/ Donald W. VanArtsdalen

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-1137

PAUL J. BOGOSIAN,

Plaintiff,

v.

GULF OIL CORPORATION, ET AL.,

Defendants.

ORDER

AND NOW, this 15th day of April 1975, the motions for summary judgments by defendants Getty, Shell and Exxon are GRANTED.

It is determined that the granting of summary judgment in FAVOR of Getty, Shell and Exxon is a final judgment and that no just reason exists for delay in this matter.

Therefore, it is certified under 28 U.S.C. § 1291 and Rule 54(b), Fed. R. Civ. P., that this is a final judgment as between the plaintiff and defendants Getty, Shell and Exxon.

BY THE COURT:

/s/ Donald W. VanArtsdalen

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

MEMORANDUM OPINION AND ORDER

VANARTSDALEN, J.

December 19, 1973

Plaintiffs seek class action certification on behalf of a nationwide class consisting of all present and former retail gasoline service station dealers who lease or have leased their respective stations from any of the defendant oil companies.¹ The basis of the complaints is that all defendants as landowner-lessors impose illegal tie-in agreements in the leasing of their respective service stations by requiring the lessees to buy and sell only the gasoline supplied by their respective lessors. Plaintiffs² contend that they are precluded from purchasing their wholesale gasoline requirements in a free and open market, thereby permitting defendant oil companies to unilaterally impose excessive wholesale prices to the financial detriment of the lessees.

Oral argument for class action certification was first held in January of 1973, at which time plaintiffs' counsel announced that they desired to "streamline" the cases in

¹ The complaints name 15 of the major oil producing and distributing companies operating nationwide.

² Paul J. Bogosian has operated a Gulf station in Watertown, Mass., since 1957 as a lessee of Gulf Oil Company. (Para. 4, Amended Complaint, CA 71-1137). Louis J. Parisi operated an Exxon station in Philadelphia, Pennsylvania, as a lessee of Exxon Corporation from July 1968 to June 1971. (Para. 4, Amended Complaint, CA 71-2543). On February 14, 1972, when Mr. Parisi's deposition was taken, he was an Arco lessee-dealer in Phila., Pa. He claims no injury by Atlantic-Richfield Company, the lessor of the Arco station.

respect to the nature of the claims and description of the class.³ Plaintiffs' counsel stated:

The single, solitary claim in this class action is as follows: The defendant franchisors acting in concert have maintained a uniform policy of requiring all those who lease, sublease or renew such lease or sublease of defendants' service station to do the following things:

First, to license the use of defendant's trademark.

Second, to sell only the defendant's gasoline.

Third, not to sell gasoline purchased from any other source under that trademark.

Fourth, to purchase all such gasoline at prices unilaterally and subjectively determined by the defendant franchisors from time to time.

That, Your Honor, is our claim. All other claims, including those involving real estate monopoly and TBA products, are abandoned.⁴

Because of the drastic alterations in the nature of the claims, as well as the stated intention of joining other major oil companies as parties defendant and the proposed withdrawal of George Hack as a class-plaintiff, leave to amend was granted, with leave to refile motions for class certification. Thereafter full briefing was filed and additional oral argument heard.

³ The original complaints sought class certification for all present, former and future service station lessees operating in communities or political subdivisions in the United States exceeding 50,000 inhabitants. The actions were broad based attacks on the distributive, pricing, leasing and real estate holding practices of the oil industry as related to retail gasoline service station owners, dealers, lessors and operators.

⁴ Page 32. Notes of Hearing held January 12, 1973.

The major thrust of the complaints is that all of the major oil companies "through a course of interdependent consciously parallel action" have engaged in illegal tying agreements in connection with the leasing of company-owned service stations, the effect of which is that the lessee operators are forced to buy their gasoline supplies exclusively from their respective lessors. Jurisdiction is founded on Sections 4 and 16 of the Clayton Act, 15 U.S.C. § 15 and § 26 and Section 1 of the Sherman Act, 15 U.S.C. § 1.

Plaintiffs contend that they should be permitted to purchase their supplies of gasoline products from any oil company or distributor they choose. They further contend that all gasoline, subject only to minor formula variations, is the same and thus a fungible commodity regardless of by whom it is produced, refined or distributed. Consequently, plaintiffs argue that not only should they be permitted to purchase gasoline from whomever they choose, but they should have the right to sell any brand of gasoline from the lessors' trademarked pumps and tanks and to sell other gasoline under different trademark brand names on the leased premises, subject only to the owners of the trademarks granting licenses to the respective lessees and imposing reasonable quality controls over the sale of the licensors' trademarked brand name gasolines.

Defendants concede that a trademark protection clause in one form or another is contained in every lease agreement or arrangement between the defendant oil companies and their respective lessees.⁵ These clauses are the primary basis for plaintiffs' claims of illegal tying agree-

⁵ a) Transcript of Sept. 4, 1973, class action oral argument, p. 75.

b) Defendants' memorandum of law opposing class certification, p. 4.

c) Transcript of Jan. 12, 1973, class action oral argument, pp. 71-?

ments. In general, the trademark protection clauses, however worded, prohibit a lessee from selling any gasoline under the lessor's trademarked brand name or from any of the pumps or tanks bearing lessor's trademark or brand name or insignia, unless such gasoline is sold and supplied to lessee by the lessor. Defendants, relying on the Lanham Act, 15 U.S.C. § 1055, 1064 and various state statutes, contend they not only have the right, but also the duty to prohibit the sale of gasoline under a particular trademark brand name unless such gasoline is supplied by the company owning the trademark and brand name rights.

Plaintiffs contend that all gasoline of a stated octane rating is substantially the same and, therefore, constitutes a fungible commodity.⁶ Rather than an absolute prohibition against the sale of one company's gasoline under another's trademark or brand name, plaintiffs assert that the holder of the trademark may do no more than license use of its trademark and brand name, specify its unique formula, if any, and police quality controls over the gasoline being sold under its brand name. This portion of plaintiffs argument is founded upon the principles of *Siegel v. Chicken Delight, Inc.*, 448 F. 2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). Plaintiffs con-

⁶ In support, plaintiffs cite: *Allvine and Patterson, COMPETITION LTD., THE MARKETING OF GASOLINE*, with excerpts from a 1965 hearing before the Federal Trade Commission to establish that gasoline is fungible; an affidavit by J. C. Sealey, of Shell Oil Co., stating that 10% of the gasoline sold under the Shell brand name is manufactured by other oil companies but meets Shell's specifications; and the *Preliminary Federal Trade Commission Staff Report on its Investigation of the Petroleum Industry* to establish that oil companies frequently exchange crude oil and gasoline. Also *Sinclair Refining Co. v. Schwartz*, 398 Pa. 60 (1959), where the Pennsylvania Supreme Court stated at 64:

... it occurs to us that one company's gasoline may not differ in content or quality from that of another merely because they differ in color or advertising slogans, at least in the regular gasolines, which seem to be uniform in price.

tend that the agreements are per se illegal tying agreements as distinct from exclusive dealing requirements contracts under the doctrines of *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002 (5th Cir.), cert. denied, 409 U.S. 1086 (1972).

Plaintiffs claim that the trademark protection clauses, constituting per se antitrust violations, and the "interdependent consciously parallel action" of all defendants warrant class certification. Defendants counter with the assertion that no lease or other agreement by its terms, express or implied, purports to prohibit plaintiffs or any proposed class member from selling another company's gasoline products on the leased premises so long as there is no trademark or brand name violation. Plaintiffs, while apparently conceding that there is no express contractual prohibition against sale of competing brands on the leased premises, point out the practical impossibility of so doing because of short-term leases, lease restrictions on improvements and alterations to the demised premises, inability of lessees to make substantial capital investments, zoning restrictions, and rental payments based on sales of lessor's gasoline. Plaintiffs finally assert that no lessee has ever successfully installed pumps and tanks of another oil company on a service station leased from one of the defendants, and sold thereon a gasoline brand name other than lessor's. Defendants counter with the argument that no lessee has ever sought or made any attempt to sell another oil company's gasoline from a leased property.

Defendants' primary objection to a class certification is that since there is no common lease clause that allegedly imposes a restriction against the sale of a competitor's gasoline products from another oil company's leased property, the question of an illegal tie-in depends upon whether there was individual coercion, a separate and distinct question as to each lessee. Defendants further point out that there are more than 400 different forms of

leases and oil sales agreements utilized by the defendants all of which would require individual interpretation not only as to each form but also as to each individually executed lease and agreement because most, if not all, contain specialized terms and conditions.

Plaintiffs contend that class action treatment is appropriate under Fed. R. Civ. P. 23.⁷ Plaintiffs assert that

⁷ (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of

the four prerequisites and 23(a) have been fulfilled, and that class action certification would be appropriate under either 23(b)(1), 23(b)(2) or 23(b)(3). Not unexpectedly, defendants contend that plaintiffs meet none of the requirements for class action certification except the 23(a)(1) prerequisite that the class is so numerous that "joinder of all members is impracticable." Conceding the great number of potential class members, defendants take the position that the class is in reality so large that notice requirements and diverse individual issues would make insurmountable difficulties in the management of a class action.⁸

The appropriateness of class action certification is not dependent upon the merits of the case. See *Miller v. Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971). The merits of the issues are entirely separate and distinct from whether a class should be certified. Even a failure to state a cause of action is not necessarily fatal to a class action certification. *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), cert. denied, 398 U.S. 950 (1970), stated: *

the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

⁸ Although there has been extensive discovery, estimates of the size of the potential class is extremely vague. There are approximately 385,000 service stations in the United States, but how many are owned by major oil companies and leased to dealers is not certainly established in the record. Also, because the proposed class includes former operators and the turnover rate is high, the estimates have a wide range. Plaintiffs estimate the total class "could possibly be less than 100,000." Defendants indicate the size between 250,000 to 2,000,000. (See plaintiff's July 9, 1973 class action brief, p. 34).

⁹ However, in *Kahan v. Rosenstiel* the Circuit Court concluded at 174: "it is our view that plaintiff's pleadings state a cause of action which may be the basis for an award of counsel fees. . ."

... The determination whether there is a proper class does not depend on the existence of a cause of action. A suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action.

While determination of the pending Rule 23 motion must be unaffected by the merits or possible final outcome of a trial on the merits, identification of the issues that will be presented at a trial would appear essential in analyzing the appropriateness of a class certification and in applying the Rule 23 standards. In *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387, 390 (S.D. Fla. 1972), the court stated:

... an analysis of the issues and the nature of proof which will be required at trial is directly relevant to a determination of whether the matters in dispute are principally individual in nature or are susceptible of proof equally applicable to all class members.

Because plaintiffs' claims are based on alleged illegal tying agreements practiced by all defendants upon their respective lessees, the requisite elements of an illegal tie-in agreement should be noted. There are three basic requisites.

1. There must be two separate products, one the tying product which cannot be obtained without purchase of the tied product. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). The alleged tying product in this case is the valuable leasehold site and the tied product is the lessor's trademarked brand name gasoline.¹⁰

2. The tying product must have sufficient economic power or advantage to appreciably restrain competition in

¹⁰ It is curious to note that most antitrust "tying agreement" cases involving trademark or brand name products have alleged that the brand name product is the tying product which is tied to the required purchase of unnecessary or undesirable products. Cf. *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, supra.

the market of the tied product. *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958).¹¹

3. The antitrust violation must affect a "not insubstantial amount of commerce." *International Salt Co. v. United States*, 332 U.S. 392 (1947).

Plaintiffs contend that class action certification would be appropriate under any of the three subsections of Rule 23(b). Before analyzing the possibility of certification under each of these subsections, recognition must be given that one of the basic claims for relief, if not the sole actual claim, is monetary damages, even though the complaints also demand that "defendants be permanently enjoined from continuing the unlawful activities alleged" and "such other and further relief as may appear necessary and appropriate."

Rule 23(b) (1) (A) was created to prevent separate adjudication which "would establish incompatible standards of conduct for the party opposing the class." Both the wording and logic of the rule indicate that it is to protect defendants. The Advisory Committee's Notes on the 1966 Amendments to the Rule state, in part:

The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways.

Quoting from *Louisell & Hazard*, PLEADING AND PROCEDURE: STATE & FEDERAL 719 (1962).

¹¹ *Northern Pacific* involved valuable leaseholds as the tying product, and is direct precedent that a unique leasehold may constitute the tie.

As I interpret 23(b) (1) (A), it is primarily to prevent a defendant from being caught in a classic "Catch 22" situation where one court orders a defendant to take certain action which another court orders the same defendant not to take. I do not understand that solely because one court might determine that a defendant is liable in damages to a particular oil lessee-dealer for an antitrust violation, while another court on an analogous factual situation might determine no liability in damages to some other oil lessee-dealer, class action treatment under 23(b) (1) (A) would be appropriate. The rule requires not only "inconsistent and varying adjudication," but such adjudications must establish "incompatible standards of conduct."

In *Goldman v. First National Bank of Chicago*, 56 F.R.D. 587 (N.D. Ill. 1972), it was stated at 590:

[I]n order for there to be a risk of varying adjudications, there must be different parties attempting to impose different standards upon an individual.

Plaintiffs seek to impose certain standards of conduct on defendants which defendants resist, but it does not appear that anyone is seeking to impose inconsistent or incompatible or even different or varying standards upon defendants.

It has been held that because Rule 23(b) (1) (A) is to protect defendants against the risk of being forced to conform to incompatible standards of conduct, if defendants are willing to accept such risk, whether real or illusory, certification may be denied. *Alsop v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972); *Kenney v. Landis Financial Group, Inc.*, 349 F. Supp. 939 (N.D. Iowa 1972). In addition, Rule 23(b) (1) (A) does not appear to have been intended to authorize certification where a primary objective is monetary damages. *Rodri-*

quez v. Family Publications Service, Inc., 57 F.R.D. 189 (C.D. Cal. 1972).

Rule 23(b) (1) (B) seeks to protect potential claimants where adjudications as to other claimants would be dispositive of the interests of other members of the potential class. A determination of issues as to one service station lessee would not be dispositive, legally or "as a practical matter" of similar claims by any other service station lessee. The precedential effect of such a judgment disposes of no other claim. The principles of *stare decisis* do not create authorization for a Rule 23(b) (1) (B) certification. *Alsup v. Montgomery Ward & Co.*, *supra*; *Goldman v. First National Bank of Chicago*, *supra*; *Rodriguez v. Family Publications Service, Inc.*, *supra*. The mere fact that one claimant might be successful and another unsuccessful creates no basis for a Rule 23(b) (1) (B) certification. *Rodriguez v. Family Publications Service, Inc.*, *supra* at 192-193, states:

... the Advisory Committee's Note to clause (B), demonstrates that the clause was intended to apply to situations, not present here, where the members of the class each have rights in a common organization, fund or contract which ought to be adjudicated together in order to avoid unfair legal or practical advantage by one over another member of the class.

Certification under Rule 23(b) (1) is therefore inappropriate.

Rule 23(b) (2) is applicable by its express terms only where final declaratory or injunctive relief with respect to the entire class is appropriate. Plaintiffs contend that the trademark protection clauses incorporated in the leases constitute per se illegal tying agreements, and therefore defendants are clearly subject to injunctive relief. Tying arrangements have been held to constitute per se violations of the Sherman Act and proof that they "unreasonably" restrain competition is not required.

Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Northern Pacific Ry. v. United States*, *supra*; *International Salt Co. v. United States*, *supra*. In the present case, however, unlike *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967), as modified by *Chicken Delight, Inc. v. Harris*, 412 F.2d 830 (9th Cir. 1969), there is no express or implied provision in the leases or other agreements between defendants and potential class members that imposes any requirement that the lessee purchase only from lessor or that lessee not sell any but lessor's gasoline. Plaintiff's contention that, as a practical matter, lessees are prohibited from so doing, of necessity seems to require individual considerations.¹² Applicable to a Rule 23(b) (2) certification, it becomes apparent that individual questions would make final declaratory or injunctive relief as to the entire class inappropriate. Obviously, the possibility that plaintiffs' theory of class wide entitlement to injunctive relief may not be sustained upon final determination of the litigation does not preclude a class certification. Nevertheless, it would seem appropriate to hesitate before issuing a class certification that might require thousands of individual factual variations to be determined. Will certification probably result in judicial economy, and serve the basic purposes and advantages of class certification?

Rule 23(b) (2) has been a useful tool primarily in civil rights cases, where class actions are often favorably considered. *Hairston v. Hutzler*, 334 F. Supp. 251 (W.D. Pa. 1971), *aff'd* 468 F.2d 621 (3d Cir. 1972); *Glus v. G. C. Murphy Co.*, 329 F. Supp. 563 (W.D. Pa. 1971). As the Advisory Committee Notes indicate, however, Rule 23(b) (2) is not limited to civil rights actions. It has been utilized in several patent cases. See *Dale Electronics, Inc.*

¹² See discussion beginning at page 19, *infra*, as to individual considerations.

v. *R.C.L. Electronics, Inc.*, 53 F.R.D. 531 (D. N.H. 1971); *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497 (N.D. Ill. 1969); *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*, 285 F. Supp. 714 (N.D. Ill. 1968).

The Notes of the Advisory Committee as to the 1966 amendments state flatly: "This subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." No guidelines are suggested in the Rule or Advisory Notes for determining whether monetary damages are the predominant final relief sought. Where as here, it appears clear that monetary damages are, at the very least, a very substantial essential element of plaintiffs' claim, certification under 23 (b) (2) would seem inappropriate. As to those former service station lessees who would not be interested in going back into the service station business under any conditions, the only possible final relief favorable to them would be monetary damages.

There seems to be little doubt that monetary damages may be awarded as relief ancillary to an injunctive decree in a class action under appropriate circumstances. See *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) (a racial discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq.); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (a Title VII sex discrimination action). That is entirely different from holding that because injunctive relief on behalf of a class is sought, a class action certification under Rule 23(b) (2) is appropriate even though one of the principal purposes is to obtain monetary damages.

There is another reason in this case that makes inappropriate the treatment of the claim for monetary damages as merely ancillary to the request for injunctive relief. Plaintiffs' complaints expressly assert jurisdiction

under Section 4 and Section 16 of the Clayton Act. Section 4 (15 U.S.C. § 15) expressly and exclusively provides for a private action for treble damages. No other relief is specified under Section 4. The only appropriate relief under this statute would appear to relate exclusively and solely to monetary damages. Section 16 (15 U.S.C. § 26) provides exclusively for injunctive relief. It has been held that an award of damages under Section 16 is improper, *Decorative Stone Co. v. Building Trades Council of Westchester County*, 23 F.2d 426 (2d Cir.), cert. denied, 277 U.S. 594 (1928), citing *Fleitmann Co. v. Welsbach Street Lighting Co.*, 240 U.S. 27 (1916). Consequently, it is unnecessary to decide whether the claim for monetary damages or the claim for injunctive relief is primary and the other ancillary, or whether, as suggested in defendants' brief (Supplemental Memorandum, p. 28), allowance of monetary damages under a 23(b) (2) certification would constitute a case of the "tail wagging the dog." To the extent that plaintiffs seek treble damages under Section 4 of the Clayton Act, certification of a class under Rule 23(b) (2) would appear to be entirely inappropriate. Section 4 damages can hardly be said to be ancillary to Section 16 injunctive relief under the statutory scheme of the Act. I, therefore, conclude that certification under Rule 23(b) (2) would be improper so long as plaintiffs seek monetary damages under Section 4 of the Clayton Act.¹³

¹³ Even if a class action could be certified under Rule 23(b) (2), it seems to me that Rule 23(b) (3) notice would be essential in order to have binding effect on class members as to any monetary award of damages. I fail to see how a class member's right to obtain damages that are expressly provided for by statute, could be finally litigated and determined, in the absence of compliance with the notice requirements of Rule 23(b) (3) with the right to "opt out". It further would appear that the major practical difference between a 23(b) (2) and a 23(b) (3) certification is the more explicit requirements for a 23(b) (3) certification and the stricter notice requirements of 23(b) (3).

[Footnote continued on page 90]

The final and most difficult determination is whether class action should be certified under Rule 23(b)(3). The primary requisites for a (b)(3) certification are that common questions of law or fact predominate and that class action is the superior method of a fair and efficient adjudication of the controversy. Specific criteria for making express findings are set forth in the Rule. In determining whether a 23(b)(3) class should be certified, a pragmatic approach must be adopted. The 1966 Advisory Committee Notes to Rule 23 state in part:

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, [Subdivisions (b)(1) and (b)(2)] but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Some indication of the types of actions suitable for Rule 23(b)(3) certification are set forth in the 1966 Advisory Committee Notes as follows:

. . . It is only where this predominance exists that economies can be achieved by means of the class-

¹³ [Footnote continued]

Regardless of the extent of constitutional "due process" requirements in giving actual notice to class members, at least insofar as monetary damages are concerned, fairness and justice would seem to mandate actual notice in order to impose binding effect of any judgment. Until and unless controlling authority dictates to the contrary, the rules prescribed in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), for notice to class members, would appear to be requisite in the type of case presently before me. Consequently, the only possible proper class certification would be under Rule 23(b)(3).

action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. [citations omitted]. . . A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. [citations omitted] Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions.

Plaintiffs claim that there is but a single issue and that "every question of fact or law germane to this issue is common to every member of the class." (Plaintiff's supplemental class action memorandum, page 12). They further contend "that the single, solitary issue in this case will be whether contractual provisions in the agreements, promulgated by the defendants, which all members of the class signed, violate the antitrust laws and therefore common issues of fact and law will undeniably predominate." (Plaintiff's supplemental class action memorandum, page 15). In the complaints, paragraph 5 alleges that "through the contracts and leases, the plaintiff was required to sell only gasoline bought from his defendant lessor." Paragraph 12 alleges that

"the defendants' leasing of service station sites . . . is conditioned upon the signing of contracts of sale or other contractual provisions for the exclusive purchase and sale of the lessor's brand of gasoline. These allegations are denied by defendants. Defendants concede only that all contracts contain a trademark protection clause.

Cases have permitted class actions where there is a common course of conduct, which is said to "predominate" notwithstanding separate contractual terms. *Lamar v. H & B Novelty Loan Co.*, 55 F.R.D. 22 (D. Ore. 1972); *Contract Buyers League v. F&F Investment*, 48 F.R.D. 7 (N.D. Ill. 1969); *See Alameda Oil Co. v. Ideal Basic Industries, Inc.*, 326 F. Supp. 98 (D. Colo. 1971).

A substantial number of cases have held that class action may be certified if the issues involving liability have predominating common issues of fact or law, even though damages may have to be individually determined and tried by a jury.¹⁴ *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Mersay v. First Republic Corp. of America*, 43 F.R.D. 465 (S.D.N.Y. 1968); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

However, class actions were held inappropriate where proof of the relevant issues would require examination of individual and disparate franchise agreements (although containing a common provision upon which plaintiffs relied in part as proof of an illegal tie-in) and determination of individual coercion. *Abercrombie v. Lum's, Inc.*, *supra*. *See Di Constanzo v. Chrysler Corporation*, 57 F.R.D. 495 (E.D. Pa. 1972); *In Re 7-*

¹⁴ The Third Circuit's recent opinion in *Katz v. Carte Blanche Corp.*, Slip Op. No. 72-1054 (3d Cir., filed May 22, 1973), holding that class action certification for issues of liability may be made, even where there may be individual issues as to whether one is a member of the class, was vacated on June 20, 1973 and a rehearing *en banc* held on November 15, 1973.

Eleven Franchise Antitrust Litigation, 1972 Trade Reg. Rep. §§ 74, 156 (W.D. Cal. 1972).

Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970), refused a class action on behalf of 140 service station dealers in Southwest Ohio where the alleged illegal tie-in concerned trading stamps and games not expressly required under the lease-contracts. Although there were substantial counterclaims asserted which had some bearing on the decision,¹⁵ class action was refused because the issue of coercive tie-in agreements required individual determinations. Similarly, class action has been denied where proof would require examination of individual business relationships. *Moscarella v. Stamm*, 288 F. Supp. 453 (E.D.N.Y. 1968); *School District of Phila. v. Harper & Row, Publishers, Inc.*, 267 F. Supp. 1001 (E.D. Pa. 1967).

Plaintiffs contend that the contracts require "the exclusive purchase and sale of lessor's brand of gasoline" and that such constitutes an illegal tie-in of the lease with the sale of brand name gasoline. It is contended that all of the defendant oil companies engage in similar practices, and that all leases require that no gasoline other than that supplied by lessors may be sold from the tanks and pumps of lessors or under the lessors' brand name. These issues, plaintiffs assert, are appropriate for class action determination even though damages may be an individual matter.

If the sole question was whether such trademark protection clauses, however worded, constituted in and of themselves violation of the antitrust laws, a class action for determining the legality of such a clause might be

¹⁵ Defendants, in this case, assert that they would file substantial individual counterclaims as to many individual service station dealers, both past and present. Although this might be critical at a damage phase of the trial, I do not consider it particularly significant in reaching a determination on the present motion for class action certification.

appropriate. Thus, in the well known and often cited cases of *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967), as modified by *Chicken Delight, Inc. v. Harris*, 412 F.2d 830 (9th Cir. 1969), there existed a standard contract clause in all of the franchising agreements which plaintiffs contended imposed an illegal tying agreement.

Is there a common lease clause prohibiting lessees from purchasing gasoline from any oil company other than their lessors? Plaintiffs rely upon the alleged admissions by defendants concerning their trademark protection clauses as evidence of this standard contract provision. Plaintiffs' reliance on defendants' admission as proof of their class action claim is misplaced. Defendants have only admitted that they uniformly employ trademark protection clauses to prevent a lessee from selling gasoline of another oil company under the lessor's brand name. Defendants have nowhere admitted that their leases contain any clause *requiring* lessees to purchase *only* the gasoline of their respective lessors. No common lease clause directly or indirectly supporting plaintiffs' allegations has been found nor have plaintiffs been able to indicate that such a clause exists. The leases do not require the sale of only the lessor's gasoline on the lease premises nor do I see how they could be so interpreted.

It is clear from briefs, depositions and arguments that plaintiffs seek to contend that *the practical economic effect of the contracts*,¹⁶ as opposed to an interpretation of the wording of the contracts, is that no lessee is able to sell another brand of gasoline from his leased service station.¹⁷ This, almost by definition, requires an examina-

¹⁶ See p. 7 of plaintiffs' motion for determination as to maintenance of class action.

¹⁷ Opposing counsel have engaged in a correspondence war over *F.T.C. v. Sinclair Refining Co.*, 261 U.S. 463 (1923). Defendants' counsel strongly contend that the case is dispositive of the present

tion into the particular situation of each and every present lessee as well as former lessees, if the class is to be maintained on their behalf. Complicating the issue is the fact that there are over 400 various contractual forms utilized among the 15 defendant oil corporations. The case is not one of interpreting the legal effect of one standard form of contract, or even of the 400 different forms of contracts and agreements. A determination of this case, on the theory upon which it has been set forth by plaintiffs would require a factual determination in each and every lease that there was such economic coercion in fact as to constitute an illegal tie-in agreement. The question of whether there are illegal tie-ins therefore of necessity requires proof of exertion of economic coercive force as to each individual dealer. Thus, the issue of liability, as well as damages, may vary from dealer to dealer and thereby make a class action determination meaningless.

Strategic land sites can be utilized as the tying products for illegal tie-in agreements. *Northern Pacific Ry. v. United States*, *supra*. The lease of a strategically located service station could likewise have sufficient economic power under certain circumstances. Unless, however, it could be determined that all oil company-leased service stations throughout the nation at all locations were so strategically located as to be able to coerce illegal tie-in agreements, class action determination would be impossible.¹⁸ It is conceded that there are numerous

controversy while plaintiffs' counsel tenaciously argue that it is clearly distinguishable from the facts of the instant action. The Supreme Court held in *Sinclair* that it was not an antitrust violation for defendant oil companies to lease pumps and underground tanks to dealer-owners upon the condition that the equipment be used only to store gasoline supplied by the lessor. The case is instructive in that the Court rejected a "practical effects" argument similar to that presented by plaintiffs in the instant action.

¹⁸ Plaintiffs' original complaint did contend as one of its major theories that the defendant oil companies had strangled free com-

independent dealers selling both trademark and unlabeled gasoline that very successfully compete with company-owned and leased service stations. Consequently, in each case, or at least in varying geographical areas throughout the nation, individual determinations would have to be made as to whether the strategic location of the industry owned stations had sufficient economic force in the market to act as an illegal "tying" product.¹⁹

Some cases recognize that a predominating question may be the existence of a conspiracy, and thus appropriate for class action treatment. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); *Morris v. Burchard*, 51 F.R.D. 530 (S.D. N.Y. 1971); *State of Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968). Plaintiffs seek to assert the allegation of "a course of interdependent consciously parallel action" as tantamount to an allegation of a conspiracy, citing *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 295 (N.D. Calif. 1971) and *Moore v. Matthews*, 1972 Trade Reg. Rep. § 74, 263 (9th Cir. 1972).

It is well established that "conscious parallelism" in and of itself, is insufficient to support a conspiratorial allegation. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Klein v. Ameri-*

petition in obtaining service station sites by buying or otherwise controlling all of the strategic sites in the nation. This theory was abandoned in the amended complaint.

¹⁹ As to some service stations, the right to sell a particular defendant's brand name gasoline might be far more valuable than acquiring the particular site; for example, at the same intersection where there are two or more service stations available on equal terms and having equal physical attributes, and in an area where one oil company has a more extensively brand name advertising campaign. In such a situation a tie-in might in fact exist, exactly converse to that claimed by plaintiffs to exist everywhere throughout the nation.

can Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963); *Fiumara v. Texaco, Inc.*, 204 F. Supp. 544 (E.D. Pa. 1962); *See Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1971). The cases cited by plaintiff hold no more than that "interdependent conscious parallel action" in connection with surrounding circumstances, would be evidence of a conspiracy. In *Wall Products Co.*, *supra*, Judge Zirpoli made a finding of fact that there was a conspiracy that involved "more than mere 'conscious parallelism.'" In any event, even if the issue were more clearly in plaintiffs' favor, a class action should not be certified because the issue of a conspiracy, even if directly alleged, would not be predominant as required by 23(b)(c). This has been the result with other antitrust suits where individual issues were found to predominate even though conspiracies had been alleged. *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972); *School Dist. of Phila., v. Harper & Row*, *supra*.

Plaintiff's argument that gasoline is fungible and therefore may not have the trademark protection claimed by defendants is unconvincing as to a class action certification. Even if a determination is made favorable to plaintiffs that all gasoline of a given octane rating is the same, this would not prove any illegal tie-in. At best, it would merely cut out one of defendants' asserted defenses. Actual prohibition of sales of other brands of gasoline from the service stations would have to be established. Since the contracts do not expressly prohibit such sales, the question of individual coercion would still have to be established as to every lessee.

There are many other problems that would arise if the case were certified as a class action. Plaintiffs' theory of damages is dubious at best. The contention is that if class members could purchase their gasoline requirements on a free and open market they could negotiate

for a lower price per gallon, and thereby reap the benefit. Plaintiffs seem to contend that the measure of damages would be the reduced price per gallon at which the lessee dealers could buy the gasoline. Despite very difficult problems of proof of such potential reduced prices, hornbook law indicates that the measure of damages would be the loss of profit. The realities of the market place would not necessarily cause an increase in lessees' profit even if lessees could purchase their individual gasoline requirements at lower prices. This is particularly applicable if, as plaintiffs' counsel so convincingly argue, all gasoline of the same octane rating is the same irrespective of brand name or trade secret formulas. Indication of the way on which price of fungible goods fluctuate within very close confines in an open and competitive market is clearly exemplified in *Wall Products Co. v. National Gypsum Co.*, *supra*.

In addition, plaintiffs completely ignore the requirements of the Robinson-Patman Act, 15 U.S.C. §§ 13, *et seq.*, which would necessitate a defendant to sell at the same price to all persons in the competitive market area.²⁰ Thus, if dealer A obtained a price reduction, the same price reduction would have to be offered to dealer B. The net result is that although a general price reduction might occur, this would be of no apparent monetary value to the retail dealer who would have to sell in a competitive market. If one accepts plaintiffs' premise that a wholesale price reduction would occur, the persons harmed are not the dealers whose profit is in the "mark-up" between wholesale and retail price, but the consuming public.

Most class action certifications that have been permitted even though proof of damages may be a matter

²⁰ By plaintiffs' seeking a nationwide class they must, it seems to me, logically contend that the competitive market area is likewise nationwide.

of individual proof appear to involve situations where establishing individual damages at least follows an easily ascertained standard pattern. The classic type of price-fixing case where it can be established that each unit sold was at an inflated fixed dollar amount per unit, and individual damages require only proof of the number of units purchased by each claimant, makes class action treatment appropriate. Where, however, individual damages require extensive individual proof of local and varying market conditions to prove loss of profit, the task becomes enormously more complicated.

Plaintiffs in oral argument have suggested that a class action is quite manageable. They suggest that notice could be by some general notice in trade publications as to former lessees. They have further suggested that if a class action is certified and it is determined judicially that the practices violate the antitrust laws, the individual claims would probably either be settled or could be referred to a master. Both of these possibilities appear to me to be improper considerations when deciding whether a class should be certified. To force settlement of honestly contested matters because of the economic realities of the costs of litigation is no more than a plain miscarriage of justice. That settlements occur every day in courts throughout the land because it is "cheaper to settle" cannot be denied. The judicial system lacks perfection. Certifying class actions, when everyone recognizes that the individual claims can never be fully litigated, with the constitutionally guaranteed right of trial by jury, because of the prohibitive costs of litigation, does not lend itself to "a fair and efficient adjudication of the controversy" and violates the purposes of Rule 23 class actions.

There would appear to be possible serious conflicts of interests between present and former lessees, and I do not believe that counsel could fairly represent both

classes. Conceivably, former lessees might have to be afforded, as part of any relief granted them, the right to re-enter the service station business in direct competition with present lessees. Present lessees may well have interests in the continued financial strength of their lessors, even though they seek both injunctive and monetary damages by way of relief. Present lessees therefore would appear to have no common interest with former lessees obtaining monetary damages. I do not, however, consider these problems as critical in this case to a class action certification as it would be possible to allow only one class or certify subclasses. Nevertheless, a conflict between present and former franchisees was deemed an important reason for terminating a class certification therefore tentatively certified by Chief Judge Lord in *Seligson v. The Plum Tree, Inc.*, — F. Supp. —, Civil Action No. 71-1998 (E.D. Pa., filed Nov. 20, 1973).

The asserted class members are presently or formerly business men who have had complicated business dealings with one or more of the defendants. Most, if not all, have invested personal capital in their business dealings with the defendants. If, as plaintiffs contend, defendants have violated the antitrust laws, and if treble damages are to be computed as plaintiffs contend, each member of the proposed class may be entitled to substantial damages. The necessity for class action treatment because individuals could not as a practical matter prosecute their individual claims is not apparent. If, as plaintiffs seem to contend, the agreements and circumstances constitute per se violations, as a matter of law, proof of liability as to individual claimants is not complicated. By class action treatment, proof is far more complicated because it would involve all defendants, all plaintiffs, and all geographical areas of the nation. The advantages therefore of class action treatment are at best minimal. Conversely class action treatment appears

to me to have substantial and insurmountable disadvantages. To force all present and former lessees to either "opt-out"²¹ or be bound by a class action decision that might very substantially effect their future business relationships with defendants does not impress me as being "superior to other available methods for the fair and efficient adjudication of the controversy." The right and probable interest of the members of the class in individually controlling the prosecution of their individual claims against such individual defendant or defendants against whom they wish to assert a claim in a forum of their choice,²² likewise weighs against class action treatment. See Rule 23(b)(3)(A).

Thus as to Rule 23(b)(3) I fail to find that questions of law or fact common to members of the class predominate over any questions affecting only individual members, both as to liability and damages. Class action is not, in my opinion superior to other available methods for the fair and efficient adjudication of the controversy. The interests of members of the class in individually controlling the prosecution of separate actions would appear to be superior to class action treatment and control. Because of disparate factual considerations in various geographical areas of the nation, concentrating the litigation in this forum does not appear to be desirable or advantageous. Management of a class action such as requested by plaintiffs presents enormous difficulties in (a) notice to class members, (b) processing individual damage claims and possible counterclaims and defenses, and (c) determining liability nationwide, as to all defendants in favor of the entire class of plaintiffs.

My final conclusion is that a class action should not be certified on behalf of plaintiffs in this action. Al-

²¹ "Opt-out" would only be allowed under a 23(b)(3) certification.

²² It is probable that most if not all of the defendants could be validly served in any federal judicial district in the nation.

though there may be certain common issues of fact and law, they are not such as to justify class action treatment under any of the provisions of Rule 23. Plaintiffs' motion must, therefore, be denied.

ORDER

AND NOW, this 19th day of December, 1973, plaintiffs' motions for class action certification in Civil Action No. 71-1137 and Civil Action No. 71-2543 are severally DENIED and DISMISSED.

BY THE COURT:

/s/ Donald W. VanArtsdalen

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

MEMORANDUM AND ORDER SUR

PLAINTIFF'S MOTION TO AMEND COMPLAINT

JOSEPH S. LORD, III, CH. J. January 13, 1972

This is a suit against eleven oil companies alleging violations by defendants of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The plaintiff has moved for leave to file an amended complaint. Defendants oppose the motion.

The original complaint alleged that plaintiff is a Gulf dealer. He complained, however, of alleged unlawful practices, not only by Gulf, but also by the other ten defendants. There were no allegations of any conspiracy among defendants. After some deposition discovery, all defendants except Gulf moved for summary judgment, arguing that plaintiff had no standing as to them. While that motion was pending, on October 20, 1971, plaintiff's counsel filed a lawsuit similar in many respects to this one, but containing allegations of a conspiracy among all defendants. LOUIS J. PARISI, et al. v. GULF OIL CORPORATION et al. (C.A. No. 71-2543). Plaintiff thereafter filed the present motion which seeks to track the conspiracy averments in the PARISI complaint.

Defendants' resistance to the amendment is based primarily on their belief that the proposed allegations are not made in good faith and are sham, since plaintiff testified on depositions, in effect, that he personally knew of no factual basis to support a conspiracy charge (see

plaintiff's deposition of July 8, 1971, pp. 159-60), and since conspiracy allegations were conspicuously lacking from the original complaint. F.R. Civ. P. 15(a) provides that at this stage of an action a party may amend his pleading by leave of court if the adverse party does not consent to such an amendment, "and leave shall be freely given when justice so requires."

It does indeed seem somewhat curious that such important allegations were originally omitted, and there may be suspicion that the omission was by design and not by inadvertence. However, on its face, the amendment is perfectly valid and proper and we cannot permit mere suspicion to constrict the liberal provisions of Rule 15.

Nor are we persuaded that plaintiff's lack of personal knowledge of conspiratorial facts is an impediment to amendment of the complaint. Experience has shown that where a conspiracy is suspected, the proof of it most frequently emerges from discovery aimed at defendants. In providing for private remedies in antitrust cases, Congress intended thereby to broaden the potential for enforcement of the antitrust laws by private citizens. To require that each private plaintiff have personal knowledge of the legal and factual intricacies of an alleged national conspiracy would impair at least to some degree the ability of private citizens to augment by private action governmental enforcement of Congress's will. *CF. SUROWITZ v. HILTON HOTELS CORPORATION, ET AL.*, 383 U.S. 363 (1966).

For the foregoing reasons, we will grant plaintiff's motion to file an amended complaint. It follows that defendants' motion to strike paragraph 17 of the original complaint must be denied as moot. Likewise, since defendants' motion for summary judgment was directed at the original complaint, now to be amended, that also

will be denied as moot. The denial of these motions, however, is of course without prejudice to the right of defendants to direct any appropriate motions to the amended complaint.

ORDER

AND NOW, this 13th day of January, 1972, it is ORDERED that plaintiff PAUL J. BOGOSIAN's motion to amend his complaint be and it hereby is GRANTED.

It is further ORDERED that the motions of defendants to strike paragraph 17 of the complaint and for summary judgment are DENIED as moot, without prejudice.

BY THE COURT

/s/ Joseph S. Lord, III
Ch. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

AMENDED COMPLAINT—CLASS ACTION

COUNT I

1. This Complaint is filed and these proceedings are instituted under Section 4 and 16 of the Act of Congress of October 15, 1944 c. 323, 38 Stat. 731 (15 U.S.C. Section 15, Section 26) for injunctive relief and to recover treble damages and the costs of suit, including a reasonable attorney's fee, against the defendants for the injuries sustained by plaintiff and other members of the class represented by him by reason of defendants' violations, as hereinafter alleged, of Section 1 of the Act of Congress of July 2, 1890 c. 647, 26 Stat. 209, 15 U.S.C. Section 1 commonly known as the Sherman Act.

2. Plaintiff, Paul J. Bogosian, is a resident and citizen of Waltham, Massachusetts.

3. The defendants, each of which transacts business and is found in the Eastern District of Pennsylvania, are the corporations listed below. Each of said defendants is organized and exists under the laws of the state, and has its principal place of business in the city, as indicated below:

Name of Corporation	State of Incorporation	Principal Place of Business
The American Oil Co.	Maryland	Chicago, Illinois
Gulf Oil Corporation	Pennsylvania	Pittsburgh, Penna.
Exxon Corporation	Delaware	Houston, Texas
Mobil Oil Company	New York	New York, New York
Phillips Petroleum Co.	Delaware	Bartlesville, Oklahoma
Shell Oil Co.	Delaware	New York, New York
Sun Oil Co.	New Jersey	Philadelphia, Penna.
Texaco, Inc.	Delaware	New York, New York
Cities Service Oil Company	Delaware	New York, New York
Atlantic Richfield Co.	Pennsylvania	New York, New York
Union Oil Company of California, Union 76 Division	California	Los Angeles, Calif.
Amerada Hess Corporation	Delaware	New York, New York
Getty Oil Company	Delaware	New York, New York
Standard Oil Company of Ohio	Ohio	Cleveland, Ohio
Standard Oil Company of California	Delaware	San Francisco, Calif.

4. Since 1957, plaintiff has operated a Gulf gasoline service station at 655 Mt. Auburn and Arlington Street, Watertown, Massachusetts under a series of service station leases and contracts of sale with Gulf Oil Corporation which have been effective for time periods ranging from six months to no longer than one year.

5. Through the contracts and leases, the plaintiff was required to sell only gasoline bought from his defendant lessor, Gulf Oil Corporation.

6. Upon information and belief, plaintiff alleges that the practice described in paragraphs 4 and 5 substantially represents and is typical of the general business practice

of each of the named defendants with each of its lessee-dealers in the plaintiff class as described below.

7. The present action is brought by the plaintiff in his own behalf and as representative of a class as defined in Rule 23 of the Federal Rules of Civil Procedure. The class consists of all present and former lessee gasoline dealers of the defendants. The members of the class are so numerous as to make it impracticable to bring them before the Court. There are liability and damage questions of law and fact common to the class which predominate over any question affecting individual members only. The claims of the representative plaintiff are typical of the claims of the class, and the plaintiff will fairly and adequately protect the interests of the class.

8. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole.

9. The prosecution of separate actions by individual members of the class would create the risk of:

(a) inconsistent or varying adjudications in different jurisdictions with respect to individual members of the class; and

(b) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the members not parties to the adjudications, or substantially impair or impede their ability to protect their interests.

10. The class action is superior to other available methods for the fair and efficient adjudication of the controversy.

11. Defendants are engaged in a national market and transport and sell petroleum products in interstate commerce.

12. Defendants have established lessee-dealerships by the use of the conditional lease methods described in paragraphs 4 and 5 herein. The defendants' leasing of service station sites together with physical improvements, tanks and pumps, is conditioned upon the signing of contracts of sale or other contractual provisions for the exclusive purchase and sale of the lessor's brand of gasoline. The lease is usually for a short period of time, and in most cases does not exceed one year. Lessee-dealers are supervised by District Managers and are personally supervised by Sales Representatives.

13. For many years past, the exact date being presently unknown to plaintiffs, but at least as early as 1957, and continuing to the present, defendants, through a course of interdependent consciously parallel action, have required all dealers who lease, sub-lease, or renew such leases or subleases for one or more of defendants' service stations to:

(a) license the use of the lessor's trademark;

(b) sell only the lessor's gasoline; and

(c) not sell gasoline purchased from any other source under the licensed trademark.

14. The leasing practices of the defendants, individually and collectively, through interdependent consciously parallel actions, as aforesaid, including the use of short-term leases, leases based on contracts for the sale of lessor's brand of gasoline, and other contractual arrangements, have enabled the defendants to compel the lessee-dealers to purchase the lessor's brand of gasoline and not to purchase any other brand of gasoline for resale.

15. With the vast economic power and control possessed by the defendants individually and collectively over the leasing of service station sites, defendants have used the said tying practices substantially to restrain free compe-

tition in the market for the sale and purchase of gasoline by retail service station outlets. A substantial amount of interstate commerce has thereby been affected.

16. The unlawful acts of defendants as aforesaid constitute an unreasonable combination in restraint of interstate trade and commerce in the marketing of gasoline in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

17. By means of their unlawful acts and pursuant to and in furtherance of the above-described combination, the defendants have in substantial measure succeeded in jointly accomplishing the following:

(a) Defendants have acquired a vast number of controlled retail outlets for the marketing of their designated brands of gasoline by unlawfully tying the leasing and subleasing of the real estate controlled by them to the exclusive marketing of their designated brands of gasoline. Defendants have thus effectively denied dealers the right to purchase gasoline from independent suppliers;

(b) Defendants have effectively denied plaintiff, Bogosian, and members of the class the ability to exercise their free choice in the marketplace between competing brands of gasoline, subject only to such standards and specifications as may be prescribed by their lessor-franchisor.

18. The effect of defendants' violations of the anti-trust laws include the following:

(a) Plaintiff, Bogosian, and each member of the class have been denied the right to buy gasoline from anyone other than his franchisor-lessor;

(b) Plaintiff, Bogosian, and each member of the class have been denied the right to market brands of gasoline chosen by themselves; and

(c) Plaintiff, Bogosian, and each member of the class have been required either to pay the franchisor-lessor whatever price the latter might wish to charge or to do without any gasoline to sell at the leased premises.

19. As a result of the defendants' unlawful combination, plaintiff and the members of the class have suffered, and unless defendants are enjoined, will continue to suffer irreparable harm and continuing damage to their ability to freely purchase gasoline without unlawful restrictions.

20. As a result of defendants' unlawful combination, plaintiff and the members of the class have sustained and are continuing to sustain damages the amount of which cannot be determined until the completion of discovery.

WHEREFORE, plaintiff Bogosian demands:

(a) That defendants and their affiliated companies and those acting in concert with defendants be permanently enjoined from continuing the unlawful activities alleged herein.

(b) Judgment against each of the defendants jointly and severally in favor of plaintiff and each member of the class he represents in threefold the damages determined to have been sustained by plaintiff, Bogosian, and each member of the class as a result of the viola-

tions alleged herein, together with the costs of suit, including a reasonable attorney's fee; and

(c) Such other and further relief as may appear necessary and appropriate.

/s/ David Berger
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

AMENDED COMPLAINT—CLASS ACTION

COUNT I

1. This Complaint is filed and these proceedings are instituted under Sections 4 and 16 of the Act of Congress of October 15, 1944 c. 323, 38 Stat. 731 (15 U.S.C. Section 15, Section 25) for injunctive relief and to recover treble damages and the costs of suit, including a reasonable attorney's fee, against the defendants for the injuries sustained by plaintiff and other members of the class represented by him by reason of defendants' violations, as hereinafter alleged, of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C. Sections 1 and 2, commonly known as the Sherman Act.

2. Plaintiff, Paul J. Bogosian, is a resident and citizen of Waltham, Massachusetts.

3. The defendants, each of which transacts business and is found in the Eastern District of Pennsylvania, are the corporations listed below. Each of said defendants is organized and exists under the laws of the state, and has its principal place of business in the city, as indicated below:

Name of Corporation	State of Incorporation	Principal Place of Business
The American Oil Co.	Maryland	Chicago, Illinois
Gulf Oil Corporation	Pennsylvania	Pittsburgh, Pennsylvania
Humble Oil & Refining Company	Delaware	Houston, Texas
Mobil Oil Company	New York	New York, New York
Phillips Petroleum Co.	Delaware	Bartlesville, Oklahoma
Shell Oil Co.	Delaware	New York, New York
Sun Oil Co.	New Jersey	Philadelphia, Penna.
Texaco, Inc.	Delaware	New York, New York
Cities Service Oil Company	Delaware	New York, New York
Atlantic Richfield Co.	Pennsylvania	New York, New York
Union Oil Company of California, Union 76 Division	California	Los Angeles, California

4. Plaintiff has, since 1957, operated a gasoline service station at 655 Mt. Auburn and Arlington Streets, Watertown, Massachusetts.

5. Beginning in 1957 to the present, plaintiff has entered into a series of service station leases and contracts of sale with Gulf Oil Corporation which have been effective for time periods ranging from six months to no longer than one year.

6. Plaintiff has been required to execute certain documents in order to effect each renewal of the lease. These documents included a "Contract of Sale" and a "Rental Schedule". The terms and conditions provided in these documents, in relevant part, have been:

(a) The "Service Station Lease" hereinafter "Lease"] has provided for the demise and lease to plaintiff of the service station site as well as certain improvements, fixtures, and equipment. The Lease has acknowledged that the parties concurrently entered into the "Contract of Sale," and has provided that as a covenant of the Lease, the breach of any of the terms and conditions of the "Contract of Sale, would constitute a breach of the Lease. The

Lease has further provided that the termination of the Contract of Sale would, at the Lessor's option, terminate the Lease.

(b) The "Contract of Sale" has required the lessee to purchase all of its petroleum product requirements from Gulf in accordance with a Commodity Schedule which included Gulf gasoline, oil, and grease. The Contract has also incorporated "Special Provisions of the Commodity Schedule."

(c) The "Special Provisions of the Commodity Schedule" have specified the quantity of gasoline to be delivered to plaintiff. A minimum delivery has been specified in the Schedule and this minimum delivery has called for the filling of all installed tanks to their capacity.

(d) The Lease has provided for the payment of rental in accordance with an attached "Rental Schedule". The Schedule has provided for a minimum rent, computed on a gallonage basis for each gallon of Gulf motor fuel delivery to or sold by the lessee. The rent has been payable at the time of accounting or payment for the gasoline delivered or sold. The Lessor, Gulf Oil Corporation, has maintained the record of each installment on the "rent."

7. Upon information and belief, plaintiff alleges that the Lease and Contract of Sale described in Paragraph 6 heretofore substantially represents and are typical of the general business practices of all of the named defendants, and are required of all other members of the plaintiff class as described below.

8. The retail market for petroleum products in cities, countries and other political subdivisions throughout the United States having over 50,000 population is dominated by the named defendant oil companies which control an exorbitantly large percentage of service station outlets throughout the United States in such areas.

PLAINTIFF—CLASS ACTION ALLEGATIONS

9. The present action is brought by plaintiff on his behalf and as a representative of class as defined in Rule 23 of the Federal Rules of Civil Procedure. The class consists of all lessee gasoline dealers, present and former, in the cities, counties, and other political subdivisions having over 50,000 population throughout the United States who were subjected to similar business practices as described in Paragraph 6 herein. The members of the class are so numerous as to make it impracticable to bring them before the Court. There are liability and damage questions of law and fact common to the class which predominate over any question affecting individual members only. The claims of the representatives plaintiff are typical of the claims of the class, and plaintiff will fairly and adequately protect the interests of the class.

10. The prosecution of separate actions by individual members of the class would create the risk of:

(a) inconsistent or varying adjudications in different jurisdictions with respect to individual members of the class; and

(b) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the members not parties to the adjudications, or substantially impair or impede their ability to protect their interests.

11. The class action is superior to other available methods for the fair and efficient adjudication of the controversy.

12. Defendants are engaged in a national market and transport and sell petroleum products in interstate commerce. Throughout the years, defendants have acquired and now own a vast number of service stations sites throughout the United States. The defendants control

over 125,000 service station sites, located throughout the United States, which are used as outlets for their respective brands of petroleum products.

13. Defendants have established lessee-dealerships by the use of the conditional lease methods described in Paragraph 6 herein. The defendants' leasing of strategically located service station sites, together with physical improvements, tanks and pumps, is conditioned upon the signing of contracts of sale for the purchase of the lessor's brand of petroleum products. The lease is usually for a short period of time, and in most cases does not exceed one year. Lessee-dealers are supervised by District Managers and are personally supervised by Sales Representatives.

14. This class action is superior to other available methods for the fair and efficient adjudication of the controversy.

15. For many years past, the exact date being presently unknown to plaintiffs, but at least as early as 1957, and continuing to the present:

(a) Defendants respectively have engaged in the practice of leasing land and physical improvements, to plaintiff and the members of the class for use as service stations, on the condition that the lessee will purchase exclusively the brand of petroleum products manufactured or produced by the lessor; and

(b) Defendants respectively have further engaged in the practice of renewing or continuing such leases on the condition that the lessees have in the past achieved and will in the future achieve the volume potential established by the lessor in the marketing of the lessor's brand of petroleum products.

(c) Defendants have conspired among themselves and with others to foreclose competition in the market for

strategically located service station sites, and to foreclose competition in the market for service station outlets for the marketing of petroleum products, through a course of interdependent conscious parallel action pursuant to a tacit understanding by acquiescence coupled with assistance whereby each of the defendants, with full knowledge of the site leasing and marketing practices of each other, engaged in a parallel program of site leasing and acquisitions together with the establishment of lessee-dealerships for the purpose of denying retail service station outlets to dealers wishing to purchase from independent suppliers of petroleum products.

16. The leasing practices of the defendants, individually and collectively, through interdependent conscious parallel actions as aforesaid, including the use of short-term leases and leases based on contracts for the sale of lessor's brand of petroleum products, has enabled the defendants to coerce and intimidate lessee-dealers who must either accede to all terms imposed by the defendants for marketing petroleum products or go out of business or otherwise be unable to acquire or lease appropriate sites for gasoline stations without such restrictions.

17. The use by defendants individually and collectively through interdependent conscious parallel actions, of practices of renewing and continuing their leases on the condition that the lessee-dealers have achieved and will continue to achieve a certain volume potential in the marketing of the lessor's brand of petroleum products as aforesaid, has enabled the defendants to coerce and intimidate their lessee-dealers who must either accede to the policies of the defendants for marketing petroleum products or go out of business or otherwise be unable to acquire or lease appropriate sites for service stations without acceding to such policies.

18. By means of vast economic power and control possessed by defendants individually and collectively over

the leasing of service station sites in large metropolitan areas, defendants have been able substantially to restrain free competition in the market for the sale and purchase of petroleum products marketed by retail service station outlets. A substantial amount of interstate commerce has been affected thereby.

19. The defendants' activities as aforesaid constitute, *inter alia*, a *per se* violation of Section 1 of the Sherman Act in that through conspiratorially parallel actions:

(a) Defendants have acquired and accumulated vast real estate holdings through long-term prime leases or purchases, throughout the nation and particularly in the larger metropolitan areas as defined above, consisting of land which is strategically located for use as service station sites. The defendants' vast economic resources have enabled them to engage in elaborate market, traffic pattern, and population studies to identify practically located sites for use as service stations. The service station sites leased or owned by defendants individually and collectively are highly prized by those seeking to acquire a sub-lease of such sites because of the value of the locations. Control of the strategic sites has been acquired by defendants individually and collectively by the use of their vast economic resources to acquire long-term leases or to purchase sites at prices above their prevailing market value.

20. The unlawful acts of defendants as aforesaid constitute an unreasonable restraint of interstate trade and commerce in the market for strategically located service station sites, as more particularly described in paragraph 8 herein, and in the market for service station outlets for the marketing of petroleum products in violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1.

21. By means of their unlawful acts and pursuant to and in furtherance of the above-described conspiracy, the

defendants have in substantial measure succeeded in jointly accomplishing the following:

(a) Defendants have acquired a vast number of assured retail outlets for the marketing of their designated brands of petroleum products by unlawfully tying the leasing and sub-leasing of the real estate controlled by them to the exclusive marketing of their designated brands of petroleum products. Defendants have thus effectively denied such outlets to independent suppliers of petroleum products seeking outlets in the retail service station market, and have effectively denied dealers the right to purchase petroleum products for independent suppliers;

(b) Defendants have done away with the necessity for bargaining with and competing for independent service station retailers in marketing of their designated brands of petroleum products;

(c) Defendants have effectively foreclosed plaintiff, Bogosian and members of the class from competing for the purchase of strategically located service station sites;

(d) Defendants have effectively denied plaintiff, Bogosian and members of the class the ability to exercise their choice between competing brands of petroleum products;

22. The effects of defendants' violations of the anti-trust laws include the following:

(a) Plaintiff, Bogosian and all members of the class have been foreclosed from competing for the purchase or lease of service station sites which are controlled by the defendants;

(b) Plaintiff, Bogosian and all members of the class have been forced to accede to unreasonable and anticompetitive practices by:

(1) The use by defendants of coercive economic power and of short-term conditional leases, which

place plaintiff and members of the class under a constant threat of cancellation and forfeiture;

(2) The use by defendants of constant inspection and supervisory visits which threaten plaintiff and members of the class with forfeitures for failing to accede to any and all demands and policies of the defendants;

(3) The use of conditional language by the defendants which denies plaintiff and members of the class the right to market a brand of petroleum products other than that of the defendants;

(4) The policies of the defendants in renewing or continuing leases on the condition that the lessee-dealer adhere to the practices of the lessor for the marketing of petroleum products which denies plaintiff, Bogosian and members of the class the right to market brands of petroleum products chosen by them;

(5) The use by defendants of extensive record-keeping to monitor the volume of petroleum products of the lessor's brand sold by the lessee;

(6) The control by the defendants individually and collectively through interdependent conscious parallel actions, of the market for service station sites, which denies plaintiff, Bogosian and members of the class the right to acquire a strategically located site without acceding to the coercive and/or restrictive practices of the defendants.

(c) Prices of petroleum products have been artificially raised and stabilized.

23. Plaintiff, Bogosian had no knowledge as to the illegality of defendants' practices, or of the facts which might have led to the discovery thereof until recently. Plaintiff Bogosian could not have discovered the illegal-

ity earlier by the exercise of due diligence because of the techniques of secrecy and fraudulent concealment employed by defendants to avoid detection.

24. As a result of defendants unlawful conduct, plaintiff and members of the class have suffered, and unless defendants are enjoined, will continue to suffer irreparable harm and continuing damage to their ability to freely compete for the lease or purchase of gasoline service station sites without unlawful restrictions and conditions.

25. As a result of defendants' unlawful conduct, plaintiff and the members of the class have sustained and are continuing to sustain damages the amount of which cannot be determined until the completion of discovery by plaintiff.

COUNT II

26. Paragraphs 1 through 18 of this Complaint are incorporated herein by reference.

27. By means of their unlawful acts as aforesaid, defendants have attempted to monopolize and have, in fact, monopolized a part of the trade or commerce among the several states, to wit, the market for strategically located service station sites in the larger metropolitan areas in violation of Section 2 of the Sherman Act, 15 U.S.C.

28. Paragraphs 21 through 25 of this Complaint are incorporated herein by reference.

WHEREFORE, plaintiff Bogosian demands:

(a) That defendants and their affiliated companies and those acting in concert with defendants be permanently enjoined from continuing the unlawful activities alleged herein, and be directed to divest themselves of all businesses involving the acquisition or control of

real estate by purchase or lease and the subsequent leasing or sub-leasing of such real estate to others for use as retail gasoline service station sites;

(b) Judgment against each of the defendants jointly and severally in favor of plaintiff and each member of the class he represents in threefold the damages determined to have been sustained by plaintiff Bogosian and each member of the class as a result of the violations alleged in Counts I and II herein, together with the costs of suit, including a reasonable attorney's fee;

(c) Such other and further relief as may appear necessary and appropriate.

/s/ David Berger
DAVID BERGER
HERBERT B. NEWBERG
JOSEPH R. LALLY
1622 Locust Street
Philadelphia, PA 19103

and

HAROLD BROWN
89 State Street
Boston, Massachusetts 02109
Attorneys for Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

[Title Omitted]

COMPLAINT—CLASS ACTION

1. This Complaint is filed and these proceedings are instituted under Sections 4 and 16 of the Act of Congress of October 15, 1944 c. 323, 38 Stat. 731 (15 U.S.C. § 15, § 25) for injunctive relief and to recover treble damages and the costs of suit, including a reasonable attorney's fee, against the defendants for the injuries sustained by plaintiff and other members of the class represented by him by reason of defendants' violations, as hereinafter alleged, of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C. Sections 1 and 2, commonly known as the Sherman Act.

2. Plaintiff, Paul J. Bogosian, is a resident and citizen of Waltham, Massachusetts.

3. The defendants, each of which transacts business and is found in the Eastern District of Pennsylvania, are the corporations listed below. Each of said defendants is organized and exists under the laws of the state, and has its principal place of business in the city, as indicated below:

Name of Corporation	State of Incorporation	Principal Place of Business
The American Oil Co.	Maryland	Chicago, Illinois
Gulf Oil Corporation	Pennsylvania	Pittsburgh, Pennsylvania
Humble Oil & Refining Company	Delaware	Houston, Texas
Mobil Oil Company	New York	New York, New York
Phillips Petroleum Co.	Delaware	Bartlesville, Oklahoma
Shell Oil Co.	Delaware	New York, New York
Sun Oil Co.	New Jersey	Philadelphia, Penna.
Texaco, Inc.	Delaware	New York, New York
Cities Service Oil Company	Delaware	New York, New York
Atlantic Richfield Co.	Pennsylvania	New York, New York
Union Oil Company of California, Union 76 Division	California	Los Angeles, California

4. Plaintiff has, since 1957, operated a gasoline service station at 655 Mt. Auburn and Arlington Streets, Watertown, Massachusetts.

5. Beginning in 1957 to the present, plaintiff has entered into a series of service station leases and contracts of sale with Gulf Oil Corporation which have been effective for time periods ranging from six months to no longer than one year.

6. Plaintiff has been required to execute certain documents in order to effect each renewal of the lease. These documents include a "Contract of Sale" and a "Rental Schedule." The terms and conditions provided in these documents, in relevant part, have been:

(a) The "Service Station Lease" [hereinafter "Lease"] has provided for the demise and lease to plaintiff of the service station site as well as certain improvements, fixtures, and equipment. The Lease has acknowledged that the parties concurrently entered into the "Contract of Sale," and has provided that as a covenant of the Lease, the breach of any of the terms and conditions of the "Contract of Sale" would constitute a breach of the Lease. The Lease has further provided that the termi-

nation of the Contract of Sale would, at the Lessor's option, terminate the Lease.

(b) The "Contract of Sale" has required the lessee to purchase all of its petroleum product requirements from Gulf in accordance with a Commodity Schedule which included Gulf gasoline, oil, and grease. The Contract has also incorporated "Special Provisions of the Commodity Schedule."

(c) The "Special Provisions of the Commodity Schedule" have specified the quantity of gasoline to be delivered to plaintiff. A minimum delivery has been specified in the Schedule and this minimum delivery has called for the filing of all installed tanks to their capacity.

(d) The Lease has provided for the payment of rental in accordance with an attached "Rental Schedule." The Schedule has provided for a minimum rent, computed on a gallonage basis for each gallon of Gulf motor fuel delivered to or sold by the lessee. The rent has been payable at the time of accounting or payment for the gasoline delivered or sold. The Lessor, Gulf Oil Corporation, has maintained the record of each installment on the "rent."

7. Upon information and belief, plaintiff alleges that the Lease and Contract of Sale described in Paragraph 6 heretofore substantially represent and are typical of the general business practices of all of the named defendants, and are required of all other members of the plaintiff class as described below.

8. The retail market for petroleum products in cities, counties and other political subdivisions throughout the United States having over 50,000 population is dominated by the named defendant oil companies which control an exorbitantly large percentage of service station outlets throughout the United States in such areas.

PLAINTIFF—CLASS ACTION ALLEGATIONS

9. The present action is brought by plaintiff on his behalf and as a representative of class as defined in Rule 23 of the Federal Rules of Civil Procedure. The class consists of all lessee gasoline dealers, present and former, in the cities, counties and other political subdivisions having over 50,000 population throughout the United States who were subjected to similar business practices as described in Paragraph 6 herein. The members of the class are so numerous as to make it impracticable to bring them before the Court. There are liability and damage questions of law and fact common to the class which predominate over any question affecting individual members only. The claims of the representative plaintiff are typical of the claims of the class, and plaintiff will fairly and adequately protect the interests of the class.

10. The prosecution of separate actions by individual members of the class would create the risk of:

(a) inconsistent or varying adjudications in different jurisdictions with respect to individual members of the class; and

(b) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the members not parties to the adjudications, or substantially impair or impede their ability to protect their interests.

11. The class action is superior to other available methods for the fair and efficient adjudication of the controversy.

COUNT I

12. Paragraphs 1 through 11 of this Complaint are incorporated herein by reference.

13. Defendants are engaged in a national market and transport and sell petroleum products in interstate commerce. Throughout the years, defendants have acquired and now own a vast number of service station sites throughout the United States. The defendants control over 125,000 service station sites, located throughout the United States, which are used as outlets for their respective brands of petroleum products.

14. Defendants have established lessee-dealerships by the use of the conditional lease methods described in Paragraph 6 herein. The defendants' leasing of strategically located service station sites, together with physical improvements, tanks and pumps, is conditioned upon the signing of contracts of sale for the purchase of the lessor's brand of petroleum products. The lease is usually for a short period of time, and in most cases does not exceed one year. Lessee-dealers are supervised by District Managers and are personally supervised by Sales Representatives.

15. For many years past, the exact date presently unknown to plaintiff, but at least as early as 1957, defendants have engaged in the practice of leasing land and physical improvements, for use as service stations, on the condition that the lessee will purchase products exclusively from the lessor. The defendants' activities constitute a *per se* violation of Section 1 of the Sherman Act for the following reasons:

(a) Defendants have acquired and accumulated vast real estate holdings throughout the nation and particularly in the larger metropolitan areas as defined above, consisting of land which is strategically located for use as service station sites. The service station sites owned or controlled by defendants are highly prized by those seeking to lease such sites because of the value of the locations. Defendants thus have a vast amount of economic power over service station sites, and the defend-

ants severally have used this power to require lessees of its sites to become dealers who market only the lessor's brand of petroleum products. Defendants severally have thus unlawfully tied the leasing of its real estate to the sale of petroleum products of the lessor's brand name. Lessees of defendants' sites must forego their free choice between competing brands of petroleum products.

(b) As a result of the vast economic power possessed by defendants over service station sites, defendants have been able appreciably to restrain free competition in the market for sites for the sale of petroleum products. A substantial amount of interstate commerce has been affected.

(c) The interlocking of the provisions of the service station leases and contracts for sale of petroleum products used by the defendants have enabled the defendants to coerce and intimidate lessees who must either accede to all terms imposed by the defendants for marketing petroleum products or go out of business or otherwise be able to acquire or lease appropriate sites for gasoline stations without such restrictions.

16. The effects of defendants' violations of the anti-trust laws include the following:

(a) Plaintiff and all members of the class have been foreclosed from competing for service station sites which have been monopolized by the defendants;

(b) Plaintiff and all members of the class have been forced to accede to unreasonable and anti-competitive practices by:

(1) the use of coercive economic power and the use by defendants of short-term conditional leases, which place plaintiff and members of the class under a constant threat of cancellation and forfeiture;

(2) the use by defendants of constant inspection and supervisory visits which threaten plaintiff and members of the class with forfeitures for failing to accede to any and all demands of the defendants;

(3) the use of conditional leases by the defendants, which denies plaintiff and members of the class the right to market a brand of petroleum products other than that of the defendant; and

(4) the monopolization of the market for service station sites, which denies plaintiff and members of the class the right to acquire a strategically located site without acceding to the coercive and/or restrictive practices of the defendant.

(c) Prices of petroleum products have been artificially raised and stabilized.

(d) Defendants' acts and the conduct of their businesses have unreasonably restrained the trade and commerce of valuable service station sites within the United States.

17. Plaintiff had no knowledge as to the illegality of defendants' practices, or of the facts which might have led to the discovery thereof until recently. Plaintiff could not have discovered the illegality earlier by the exercise of due diligence because of the techniques of secrecy and fraudulent concealment employed by defendants to avoid detection.

18. As a direct and proximate result of defendants' unlawful conduct, plaintiff and the members of the class have sustained damages which cannot be determined until the completion of discovery by plaintiff.

COUNT II

19. Paragraphs 1 through 13 of this Complaint are incorporated herein by reference.

20. Defendants have severally attempted to monopolize and have, in fact, jointly monopolized a part of the trade or commerce among the several states, to wit, the market for strategically located service station sites in the larger metropolitan areas as noted above.

21. Paragraphs 17 and 19 of this Complaint are incorporated herein by reference.

WHEREFORE, plaintiff demands:

(a) That defendants and their affiliated companies and those acting in concert with defendants be permanently enjoined from continuing the unlawful activities alleged herein, and be directed to divest themselves of all business involving the acquisition of control of real estate by purchase or lease and the subsequent leasing or subleasing of such real estate to others for use as retail gasoline service station sites.

(b) Judgment against each of the defendants jointly and severally in favor of plaintiff and each member of the class he represents in threefold the damages determined to have been sustained by plaintiff and each member of the class as a result of the violations alleged in Counts I and II herein, together with the costs of suit, including a reasonable attorney's fee;

(c) Such other and further relief as may appear necessary and appropriate.

DAVID BERGER
HERBERT B. NEWBERG
H. LADDIE MONTAGUE, JR.
HOWARD L. SCHAMBELAN
JOSEPH R. LALLY
1622 Locust St., Phila., PA 19103
and
HAROLD BROWN

Rule 1.

SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 12.

DEFENSES AND OBJECTIONS—WHEN AND HOW
PRESENTED—BY PLEADING OR MOTION—
MOTION FOR JUDGMENT ON THE PLEADINGS

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction of the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief

can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of their interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under the subdivision (b) (1) or (b) (2) whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of action to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 56.

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affidavit is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party must not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit

facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

FILE 7-1833 75-1666
ENCL. DOCKET Paul J. Bogosian
27

UNITED STATES COURT OF APPEALS
FOR THE
THIRD
CIRCUIT

APPEAL FROM	CASE NO. 75-1666
EASTERN DISTRICT OF PENNSYLVANIA	
CLOSED	
TITLE OF CASE	ATTORNEYS FOR APPELLANT
David Berger	

PAUL J. BOGOSIAN, on behalf of himself and
all those similarly situated,

Appellant

vs.

ATTORNEYS FOR APPELLEE
Edward W. Mullinix (Standard Oil Co. and Union
Schnader, Harrison, Segal & Lewis Oil Co. of
Calif.)

GULF OIL CORPORATION, AMERICAN OIL COMPANY,
HUMBLE OIL & REFINING COMPANY, MOBIL OIL COMPANY,
PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY,
SUN OIL COMPANY, TEXACO, INC., CITIES SERVICE
OIL COMPANY, ATLANTIC RICHFIELD COMPANY, UNION
OIL COMPANY OF CALIFORNIA, UNION 76 DIVISION
Amerada Hess Corp., Hess Oil and Petroleum
Division, Getty Oil Company, Standard Oil Company
of Ohio Standard Oil Company of California

Frank W. Morgan (Gulf Oil Corp.)

George P. Williams, III (Chevron Oil Co.)
Schnader, Harrison, Segal & Lewis

Hoyt H. Harmon, Jr. (Gulf Oil Corp.)

Barbara W. Mather (Sun Oil Co.)
Pepper, Hamilton & Scheetz

William R. Slye (Texaco, Inc.)

Patrick T. Ryan (American Oil Co.)

William Simon (Shell Oil Co.)
Howrey & Simon

(Benjamin M. Quigg, Jr. (Exxon Corp.)
(Stephen W. Armstrong
(Morgan, Lewis & Bockius
(Robert L. Norris (Exxon Corp.)

No. BELOW: D. C. Civil Action No. 71-1137

JUDGE BELOW: Donald W. Van Artsdalen

DATE OF JUDGMENT:

NOTICE OF APPEAL FILED: May 13, 1975
Commenced in D.C. May 12, 1971

DATE	ACCOUNT OF APPELLANT
1975	
June 23	Clerk's Fee
6-30-75	29*93

Robert W. Sayre (Amerada Hess Corp.)
(H. Francis DeLone (Getty Oil Co.)
(Richard G. Schneider

Henry T. Reath (Texaco Inc.)
Duane, Morris & Heckscher

Supreme Court, U. S.

FILED

DEC 23 1977

MICHAEL BODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

No. 77-740

GULF OIL CORPORATION, et al.,

Petitioners,

v.

PAUL J. BOGOSIAN,

Respondent.

GULF OIL CORPORATION, et al.,

Petitioners,

v.

LOUIS J. PARISI,

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-740

GULF OIL CORPORATION, et al.,
Petitioners,

v.

PAUL J. BOGOSIAN,
Respondent.

GULF OIL CORPORATION, et al.,
Petitioners,

v.

LOUIS J. PARISI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately designated in the petition.

JURISDICTION

The jurisdictional requisites are sufficiently set forth in the petition.

QUESTIONS PRESENTED

The questions involved, in the order in which they were treated by the Court of Appeals, are as follows:

(1) Whether respondents' allegations of a combination in restraint of specified interstate trade and commerce sufficed to state a claim under the pleading standards of Rule 8(a), Fed. R. Civ. P.

(2) Whether purchase of one product conditioned on purchase of another is an illegal tying arrangement for which a purchaser may recover resulting illegal overcharges, given economic power over the tying product and an effect on a not insubstantial amount of interstate commerce.

(3) Whether the Court of Appeals was within its authority in correcting errors of law made by the District Court in the application of Rule 23, Fed. R. Civ. P.

STATUTE AND RULES INVOLVED

The petition sets forth, as the statute and rules involved, Section 1 of the Sherman Act, 15 U. S. C. § 1, and Rules 1, 12, 23 and 56 of the Federal Rules of Civil Procedure (Pet. at 4; Pet. App. 132-38). Petitioners have omitted Rule 8, Fed. R. Civ. P., whose proper interpretation is also involved. Rule 8 is, therefore, set forth at R. App. 1A.¹

1. R. App. refers to respondents' appendix, which is bound at the back of this brief.

STATEMENT

These are actions brought by two service station lessee-dealers, respondents herein,² challenging petitioners' uniform practice of tying leases of improved service station sites to the purchase of gasoline supplied by each dealer's lessor. Plaintiffs allege that defendants have combined unreasonably to restrain interstate trade and commerce in gasoline in violation of Section 1 of the Sherman Act by jointly imposing on all lessee-dealers a number of requirements as conditions of obtaining and renewing a service station lease.³ These conditions are, *inter alia*, that respondents:

(i) license the use of the individual lessor's trademarks;

(ii) not purchase gasoline from anyone other than the individual lessor for sale under the lessor's trademark; and

(iii) not sell any other supplier's gasoline at all, whether or not under a licensed trademark (Pet. App. 109).

The result of these conditions is to foreclose plaintiffs from purchasing gasoline from anyone but the respective lessors, and to raise and stabilize the price of gasoline to plaintiffs and, indirectly, the public.⁴

2. The cases have been treated by the trial court as consolidated for purposes of discovery and pre-trial motions (Pet. App. 57 n. 1), and have been treated as consolidated by all parties and by the Court of Appeals below.

The District Court's jurisdiction was invoked under 28 U. S. C. § 1337.

3. Plaintiffs' allegation of combination was based on defendants' parallel conduct in imposing significantly similar lease conditions on all lessee-dealers.

4. In their original and first amended complaints, plaintiffs also alleged a number of other illegal restraints of trade imposed on them by defendants (Pet. App. 117-120). These allegations were withdrawn in a second amended complaint in the interest of narrowing the issues in dispute (Pet. App. 76-79).

Since defendants' service station leasing practices involve issues common to the entire class of petitioners' lessee-dealers, plaintiffs moved to have a class of all such lessee-dealers certified pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs sought class certification of two claims: a trademark-based tying claim and a lease-tying claim. The trademark claim was grounded on defendants' admitted common lease clauses requiring sale only of petitioners' gasoline under their trademarks, notwithstanding the alleged fungibility of the gasoline (Pet. App. 34, 78). The lease tying claim was based on a number of other common conditions in defendants' leases, including short lease terms, leasehold alteration prohibitions, and minimum gasoline purchase requirements (Pet. App. 32). These conditions deprived each service station dealer of freedom to sell gasoline supplied by anyone other than its lessor (including under other trademarks) (Pet. App. 32).

The District Court recognized that defendants' so-called "trademark protection" clauses were the "primary basis" of plaintiffs' action, and that the trademark-tying claim based on these clauses presented a common question that, by itself, "might be appropriate" for class treatment (Pet. App. 93-94). However, with respect to the lease-tying claim, the District Court held that a tying violation could not be established by proof of the class-wide conditioning effect of the common terms of the leases. It assumed that establishing a tying violation required a showing of "economic coercion" of each lessee-dealer as well (Pet. App. 94-95). Based on its belief that there was a predominating individual question of coercion as to each lessee, the District Court denied class treatment of *all* of plaintiffs' claims (Pet. App. 101-102). Thus, despite defendants' admission that all their leases contain "trade-

mark protection" conditions (Pet. App. 78), the District Court denied class treatment of the trademark tying claim without considering whether that claim should be certified by itself for separate class treatment pursuant to Rule 23(c)(4)(A), Fed. R. Civ. P.

Thereafter, beginning in May of 1974,⁵ motions for summary judgment were made by all defendants, petitioners herein, who had had no business dealings with respondents. Respondents moved for discovery pursuant to Rule 56(f), Fed. R. Civ. P., in order to develop evidence of defendants' illegal combination, such evidence being of course in the hands of defendants. However, treating defendants' summary judgment motions as, in effect, motions to dismiss under Rule 12(b)(6), Fed. R. Civ. P.,⁶ the District Court, on April 15, 1975, granted the summary judgment motions while denying plaintiffs' Rule 56(f) discovery motion (Pet. App. 61). It erroneously read the complaints as containing no allegation of combination and only an allegation of interdependent consciously parallel action, and, therefore, held that the complaints failed to state a "cause of action" under Section 1 of the Sherman Act (Pet. App. 61, 68). The District Court thereupon entered final judgment pursuant to Rule 54(b), Fed. R. Civ. P. (Pet. App. 74-75).

In July, 1977, the Court of Appeals vacated the District Court's class action order and reversed its summary

5. Shell Oil Corporation's Motion for Summary Judgment was filed on May 28, 1974.

6. The District Court excluded any consideration of disputed issues of fact and looked only to the allegations in the complaint (Pet. App. 59, 61, 68). The District Court thus treated the summary judgment motions as the equivalent of motions to dismiss under Rule 12(b)(6), Fed. R. Civ. P. The Court of Appeals also treated the summary judgment motions as motions to dismiss (Pet. App. 15-17), and petitioners have not urged any different treatment in their petition.

judgment order (Pet. App. 42).⁷ The Court of Appeals first held that the allegation of a combination in plaintiffs' complaint sufficed to state a claim under Section 1 of the Sherman Act because it appeared that there was a set of facts which, if proven, would entitle plaintiffs to relief (Pet. App. 19-21). Citing well-established law, the Court of Appeals simply instructed the District Court that defendants' parallel conduct was circumstantial evidence from which a combination can be inferred in appropriate circumstances (Pet. App. 20). The Court of Appeals also held that plaintiffs' alternative theory of relief, that interdependent conscious parallelism as opposed to conscious parallelism stated a Sherman Act Section 1 claim, could not be adjudicated in the absence of an appropriate factual record (Pet. App. 21-22).

On the class action issue, the Court of Appeals, upon careful review of the decisions of this Court and the other courts of appeal, held that the District Court had erroneously identified purchaser coercion as an independent element of a tying violation where a sale on condition was already established (Pet. App. 26-31, 32-33). The Court of Appeals thereupon examined the other class action rulings of the District Court and concluded that the court had erroneously misidentified as individual issues other issues common to the class (Pet. App. 34-41). It therefore vacated the District Court's class certification order and remanded the cases to that court for it to consider whether or not the common issues, now correctly identified, warranted class action treatment (Pet. App. 35, 39, 42).

7. Defendants had moved to dismiss the appeal on the ground that final judgment had been improperly entered below. Defendants' motions were considered together with the merits, and were denied by the Court of Appeals in its July, 1977 decision (Pet. App. 8-14).

ARGUMENT

I.

The Court of Appeals Correctly Determined the Sufficiency of the Complaints and Did Not Reach Any Decision in Conflict With Those of This Court or the Courts of Appeals

A comparison of the decision of the Court of Appeals with the petition shows that petitioners do not quarrel with the law applied by the Court of Appeals, but only with the result reached. This is not a proper ground for certiorari.

A. The Court of Appeals Used the Proper Criteria to Determine Whether or Not the Complaint Stated a Claim

Petitioners seek certiorari on the ground that the Third Circuit's resolution of the motion to dismiss⁸ conflicts with settled principles of law regarding federal practice pursuant to Rules 12(b)(6) and 56, Fed. R. Civ. P. (Pet. at 9, 13). Nothing could be further from the truth. The inflammatory rhetoric of the petition notwithstanding, the Third Circuit simply used the following universally accepted criteria in evaluating the sufficiency of the complaint:

"The standard by which the orders must be tested is whether taking the allegations of the complaint as true, *Cooper v. Pate*, 378 U. S. 546 (1964), and viewing them liberally giving plaintiffs the benefit of all inferences which fairly may be drawn therefrom, *see Murray v. City of Milford*, 380 F. 2d 468, 470 (2d

8. See note 6, *supra*.

Cir. 1967), 'it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief.' *Hospital Building Co. v. Trustees of Rex College*, 425 U. S. 738, 746 (1976)." (Pet. App. 17).

See *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974); *Cruz v. Beto*, 405 U. S. 319, 322 (1972); *Jenkins v. McKeithen*, 395 U. S. 411, 422 (1969); *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957), which all hold that an action is not to be dismissed if there is any basis upon which the plaintiff may recover.⁹

The decision of the Court of Appeals is completely consistent with these long-settled principles. Citing case law of this Court to whose application petitioners take no exception here, the Third Circuit first noted that interdependent consciously parallel action, which plaintiffs had alleged as grounds for their claim, is well-accepted circumstantial evidence of combination under certain particular circumstances (Pet. App. 20).¹⁰ Further, noting that plaintiffs were not required "to plead the basis upon which [the] combination will be proven," the Third Cir-

9. For cases in the lower courts, see 5 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1215 at p. 113 n. 67 (collecting cases) & 1357 at pp. 600-605 (collecting cases).

10. The Third Circuit relied on *First National Bank of Ariz. v. Cities Serv. Co.*, 391 U. S. 253, 274-88 (1968) and *Interstate Circuit, Inc. v. United States*, 306 U. S. 208 (1939). *Interstate Circuit* holds that a tacit agreement may be inferred from circumstantial evidence, 306 U. S. at 226-27, while *First National Bank* holds that alleged co-conspirators must have some motive for agreement before a combination can be inferred from parallel conduct. 391 U. S. at 284-88. Accordingly, the Court of Appeals held here, as it had in *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F. 2d 1309, 1314 (1975), that a combination could be inferred from petitioners' admitted parallel conduct (see Pet. App. 78) if plaintiffs can prove independent economic interest contrary to agreement, and a motive to agree on the part of petitioners (Pet. App. 20). Petitioners do not disagree with this holding here.

cuit held the complaints sufficient because it was possible that plaintiffs could prove the particular circumstances which would make the alleged consciously parallel conduct prima facie evidence of combination (Pet. App. 20). In thus holding the complaints sufficient because there appeared to be a basis on which plaintiffs would be entitled to relief, the court below did no more than follow this Court's instructions in *Conley v. Gibson* and its progeny, *supra* at p. 8.

In claiming that the Third Circuit abrogated summary procedures in complex civil litigation, petitioners focus selectively on the Court of Appeals' refusal to decide the sufficiency of plaintiffs' *alternative* interdependent conscious parallelism theory, calling this refusal the "essential" holding of the decision (Pet. at 10-14; Pet. App. 21-22). Petitioners thus ignore the Court of Appeals' application of settled principles of pleading review in its determination that—regardless of whether interdependent conscious parallelism was itself actionable—the complaint alleged a traditional Sherman Act combination (Pet. App. 17-21). The foundation of petitioners' contentions collapses when one recognizes that the refusal to decide the interdependent conscious parallelism issue, far from being the basis of the Third Circuit's opinion, is only a holding on an alternative contention made after the basic sufficiency of the complaint had been upheld.¹¹

Similarly, petitioners' emotional arguments that there will be discovery in a vacuum amounting to "jurisprudential anarchy" (Pet. at 11), also rest entirely on the peti-

11. The Court of Appeals' refusal to decide an issue unnecessarily, far from being a repeal of accepted canons of procedure, comports with the universally recognized judicial duty to refrain from making abstract and unnecessary pronouncements of law. Moreover, its refusal to decide a novel question of antitrust policy *in vacuo* is also consistent with accepted judicial practice. See, e.g., *White Motor Co. v. United States*, 372 U. S. 253, 263-64 (1963).

tion's mistaken premise that the theory of respondents' case is *solely* interdependent conscious parallelism. These arguments are belied by the Court of Appeals' holding that plaintiffs would have to prove a combination and by that court's careful delineation of the circumstantial evidence necessary to prove such a combination (Pet. App. 20). The lower court can readily guide discovery within the parameters set out by the Court of Appeals.¹²

Finally, petitioners seek certiorari by arguing that *this* case "demonstrates the need for summary procedures" because six years have elapsed since the complaints were filed (Pet. at 13-14). Quite aside from whether this is grounds for certiorari, petitioners are hardly blameless for the amount of time this litigation has consumed. Three of these six years have been expended on a formalistic battle over the sufficiency of the complaints, even though the complaints were sufficient in the first instance to state a traditional Section 1 combination claim.¹³ As the Court of Appeals stated in holding the complaints sufficient to state a claim of combination, "the goals of judicial administration are retarded, not advanced, when the pleadings are used as a battleground for legal skirmishes without the necessary factual development upon which to focus decision." (Pet. App. at 21) (citation omitted).¹⁴ Moreover, the Court of Appeals' refusal to decide the interdependent conscious parallelism issue does not have any general effect on the availability of summary procedures to determine

12. See *Manual For Complex Litigation* ¶ 1.10.

13. Moreover, the same petitioners who now argue that the questions presented warrant "urgent review" in this Court (Pet. at 3) argued below that these questions were not even appealable (Pet. App. 8); see note 7, *supra*. It is at the very least anomalous that defendants now complain of a delay to which they have contributed in this manner.

14. For like observations, see *Rennie & Laughlin, Inc. v. Chrysler Corp.*, 242 F. 2d 208, 213 (9th Cir. 1957).

questions of law. The Third Circuit did not eliminate their availability in complex cases or anywhere else, but only held summary dismissal for failure to state a claim inappropriate in this particular case. Compare *White Motor Co. v. United States*, 372 U. S. 253, 263-64 (1963).

It is apparent that what petitioners seek to have this Court believe is that the universally accepted pleading standards set forth in *Conley v. Gibson* and subsequent cases, *supra* p. 8, are to be compromised because a case is large or complex, or because a significant amount of time has passed since its institution.¹⁵ In effect, what petitioners are clamoring for is the imposition on plaintiffs in such cases of a significantly heavier pleading burden. This is dramatically evidenced by the petitioners' (and the dissent's) claim that the plaintiffs must plead a theory in their complaint (Pet. at 12; Pet. App. 42). Such a proposition is astounding inasmuch as the "theory of the pleadings" doctrine has been thoroughly discredited in federal practice, and was eliminated by the promulgation of the Federal Rules of Civil Procedure in 1938. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1219 (collecting cases).¹⁶

15. It should be remembered, however, that the "big case" arises when members of major industries combine to commit large-scale violations of law causing widespread injury, as, for example, in the well-known electrical equipment price-fixing conspiracy of the 1960s.

16. Petitioners, and the District Court as well, similarly make the erroneous assertion that plaintiffs must plead a "cause of action" in the complaint (Pet. at 11; Pet. App. at 61). However, contrary to the numerous assertions in the petition (Pet. at 11, 13, 15), there is no requirement that plaintiffs plead a "cause of action". Federal Rule of Civil Procedure 8(a) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." (R. App. 2A) (emphasis supplied). This Court's Advisory Committee in 1955 specifically rejected a proposal that Rule 8(a)(2) be modified to require the pleading of a "cause of action". See 2A *Moore's Federal Practice* ¶ 8.12, at pp. 1691-92.

The difficulties of the big case are now appreciated by everyone, but they cannot obscure the fact that there are valid policy objectives embodied in the private action provisions of the antitrust laws. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 (1977). If improvements are to be secured in the administration of these cases they should come about after extensive study of the operation of the Rules and the development of an overall set of new procedures—not through *ad hoc*, draconian dismissals of individual cases through the imposition of unjustified pleading burdens on individual claimants. Plaintiffs here have a right not to have major surgery performed on the Federal Rules at their expense when a full diagnosis of the big case problem has yet to be made. That, respondents submit, is all that petitioners can be seeking on this application.

B. The Petition Seeks to Present an Abstract Question Not Even Decided by the Court Below

Petitioners also contend that the Court of Appeals held interdependent conscious parallelism to violate Section 1 of the Sherman Act (Pet. at 10, 14-17). Petitioners so argue even though the Court of Appeals declined to decide this issue without any record, and even though that court recognized that a decision on this issue might well be unnecessary (Pet. App. 22).¹⁷

Again, the explanation for the gap between the petition and the opinion lies in a mischaracterization by peti-

17. Indeed plaintiffs have already, without any discovery on the merits, developed evidence of a pattern of agreement among defendants in the form of widespread exchange or "swapping" agreements (Pet. App. 79, n. 6). The existence of this pattern, in which defendants frequently sell their gasoline to each other while refraining from selling to each others' lessee-dealers, is itself direct evidence of action contrary to what would be defendants' independent economic interests absent collusion. It is, therefore, circumstantial evidence of combination under *Venzie Corp.*, *supra*

tioners. The petition simply ignores the Court of Appeals' unexceptionable holding that consciously parallel conduct is, in circumstances which respondents seek to prove,¹⁸ admissible circumstantial evidence of combination (Pet. App. 20).

What petitioners are urging, in seeking certiorari on the interdependent conscious parallelism issue, is that respondents are forever wed to this theory since it was pleaded in the complaint (Pet. at 10-11). However, as the Third Circuit implicitly recognized in relying on the more traditional and well-accepted role of conscious parallelism as circumstantial evidence, respondents are *not* irrevocably bound to a theory they pleaded to the exclusion of any other valid theory of liability grounded on the facts alleged. *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F. 2d 772, 776 (7th Cir. 1976); *Thompson v. Allstate Ins. Co.*, 476 F. 2d 746 (5th Cir. 1973) (Wisdom, J.). It is this result, long accepted as a matter of federal civil procedure,¹⁹ with which petitioners quarrel in seeking to confine the theory of this litigation to interdependent con-

17. (Cont'd.)

note 10. Furthermore, this pattern of "swapping" is evidence of product fungibility.

Defendants, in effect, seek to shield this evidence from further discovery through their restrictive construction of the complaint. However, the very fact that the relevant evidence in this case is largely in the hands of defendants is part of what made summary dismissal in the District Court incorrect. *Hospital Building Co. v. Trustees of Rex College*, 425 U. S. 738, 746 (1976). Indeed, through discovery of evidence in the hands of defendants, respondents may well obtain *direct* evidence of the combination suggested by defendants' parallel practices.

18. These circumstances are independent economic interest running contrary to agreement, and motive to agree (Pet. App. 20). See note 10 *supra*.

19. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1219 at p. 145, n. 51 (collecting cases).

scious parallelism.²⁰ However, certiorari should not be granted merely to review results unfavorable to particular litigants. Rather, certiorari is appropriate to review important or unsettled issues of procedural or substantive law. *E.g.*, *La Buy v. Howes Leather Co.*, 352 U. S. 249, 251 (1957). There is no unsettled law created by the decision below concerning the proper construction of the complaint under *Conley v. Gibson* and *Hospital Building Co.*, *supra* p. 8. There is also no unsettled law concerning the admissibility of parallel conduct as circumstantial evidence of combination. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U. S. 537, 541 (1954);²¹ *American Tobacco Co. v. United States*, 328 U. S. 781,

20. Notably, the dissent, like the petition, disregards the majority's ruling that the complaints alleged a combination which could be proven by circumstantial evidence. The error of the dissent, on which its discussion of conscious parallelism and undefined discovery is based, is its purportedly "favorable," but actually literal, reading of the complaint as alleging only interdependent conscious parallelism (Pet. App. 45). This literal reading directly contradicts the rules of pleading construction adopted by this Court in *Conley v. Gibson et seq.*, as the majority opinion recognized (Pet. App. 17, 19).

Apparently, the dissent would have been satisfied if the complaint had alleged a combination "evidenced" by consciously parallel business behavior instead of a combination "constituted" thereby (see Pet. App. 45). However, the Federal Rules of Civil Procedure are plainly at war with the idea that the mere form of statement in a complaint is controlling. *See, e.g.*, Rule 8(f), Fed. R. Civ. P. (R. App. 3A) (complaints shall be construed to do substantial justice). The 1955 Advisory Committee Report to this Court observed: "• • • [T]he Rules are designed to discourage battles over the mere form of the statement." (reprinted in 12 C. Wright & A. Miller, *Federal Practice and Procedure*, Appendix F, at p. 591).

21. Petitioners correctly cite *Theatre Enterprises* for the proposition that consciously parallel behavior is not *by itself* a Sherman Act violation (Pet. at 15), but disregard the case's explicit recognition of parallel conduct as "admissible circumstantial evidence from which the fact finder may infer agreement." 346 U. S. at 540-41 (citations omitted).

809-10 (1946); *United States v. Masonite Corp.*, 316 U. S. 265, 274-75 (1942); *Interstate Circuit Inc. v. United States*, 306 U. S. 208 (1939); *see also First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U. S. 253, 284-88 (1968).

Indeed, petitioners are constrained to find conflict in the decisions by focusing on the Third Circuit's holding that interdependent conscious parallelism "*may*" state a Section 1 claim (Pet. at 15) (emphasis supplied). Since the Court of Appeals did not decide this issue, there is no conflict with other decisions. Petitioners' arguments on the insufficiency of interdependent conscious parallelism alone to state a Section 1 claim (Pet. 14-17) actually raise a purely abstract question which this Court, like the appellate court below, would not be required to reach in order to decide the sufficiency of the complaints. *Cf. The Monrosa v. Carbon Black Export, Inc.*, 359 U. S. 180, 183-84 (1959) (certiorari dismissed as improvidently granted where adequate ground for decision below existed); *Oliphant v. Brotherhood of Locomotive Firemen*, 359 U. S. 935 (1959) (certiorari inappropriate in "abstract context").

Finally, the absence of any conflict between the decision below and other authorities renders petitioners' jeremiad on the unavailability of in banc review immaterial. In the absence of intracircuit conflict there is, of course, no need for in banc review merely for disappointed litigants to reargue the same matters. *United States v. Rosciano*, 499 F. 2d 173 (7th Cir. 1974); *cf. United States v. Doe*, 455 F. 2d 753, 762 (1st Cir. 1972), *vacated on other grounds sub nom. Gravel v. United States*, 408 U. S. 606 (1972).

II.

Substantive Antitrust Law Does Not Require a Showing of Explicit Coercion When the Sale of One Product Is Conditioned on Sale of Another.

The Court of Appeals, on the basis of an extended analysis of the case law of antitrust tying violations as developed in this Court and the other courts of appeals, concluded that a separate element of additional buyer "coercion" is not part of a tying violation where a sale on condition has been shown (Pet. App. 28 & 27-31). Rather, the fact that a buyer could not purchase one product unless, as a result of a defendant's economic power over that product, he was contractually obligated to purchase another product, was held sufficient to prove a tying violation under the antitrust laws (Pet. App. 27-31). This conclusion is directly and indeed unequivocally supported by the decisions of this Court and the lower courts, as well as by considerations of antitrust policy.

In *Times-Picayune Publishing Co. v. United States*, 345 U. S. 584 (1953), this Court stated that a showing of illegal conditioning definitionally constituted the requisite showing of coercion, observing:

"By conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of buyers' independent judgment as to the 'tied' product's merits . . ." 345 U. S. at 605 [emphasis supplied].²²

22. Petitioners' citation from *Times-Picayune Publishing Co.* is taken out of context (Pet. at 25). In the language quoted by petitioners, the Court was referring only to the requirement that two meaningfully separate products must exist before a tying violation can be found, not to what constitutes a tie.

Similarly, in *Northern Pac. Ry. Co. v. United States*, 356 U. S. 1 (1958), this Court noted the distinguishing indicia of a tying arrangement:

"A tying arrangement may be *defined* as an agreement by a party to sell one product *on the condition* that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."⁴

4. Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.

356 U. S. at 5-6 (emphasis supplied; footnote by the Court). See also *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U. S. 495, 517 (1969) (White, J., dissenting) ("What triggers the application of the antitrust laws is the asserted tying arrangement, the sale of one product conditioned on the purchase of another").

The decision of the Court of Appeals below is similarly in harmony with those of every other circuit that has spoken on the question, as well as with the Third Circuit's own decision in *Ungar v. Dunkin' Donuts, Inc.*, 531 F. 2d 1211 (3d Cir. 1976), *cert. denied*, 429 U. S. 823 (1976). These courts have all held that where a sale on condition is shown no separate showing of coercion is necessary, coercion being implicit in the unavailability of the tying good without the tied good. Only in the absence of contractual conditioning have courts held a separate showing of some other form of coercion to be necessary. In *Ungar* itself, for example, the Third Circuit stated that the existence of a condition in a contract of sale for the tying good was sufficient to prove a tying violation, saying:

"A formal agreement is not necessary, though it is *sufficient*. But, *in the absence* of a formal agreement, a plaintiff must establish *in some other way*

that a tie-in was involved and not merely the sale of two products by a single seller." 531 F. 2d at 1224 [emphasis supplied].

Petitioners conspicuously omit reference to this statement in *Ungar* in their apparent haste to create the appearance of conflict in the decisions.

Similarly, the other courts of appeals that have analyzed the issue have uniformly recognized that additional coercion need not be shown in a tying case when a condition is included in a contract of sale for two products. These courts have all held that the condition is itself sufficient to supply the requisite coercion, and that a separate showing of coercion need only be made in the absence of a contractual condition. See *Moore v. Jas. H. Matthews & Co.*, 550 F. 2d 1207, 1216-17 (9th Cir. 1977); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F. 2d 1307, 1328 (5th Cir. 1976); *Hill v. A-T-O, Inc.*, 535 F. 2d 1349, 1355 (2d Cir. 1976); cf. *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F. 2d 55, 64 (4th Cir. 1969), cert. denied, 397 U. S. 920 (1970). See also *Aamco Automatic Transmissions, Inc. v. Tayloe*, 407 F. Supp. 430 (E. D. Pa. 1976). Notably, although petitioners argue, inexplicably, that a tying violation changes form and takes on an extra element when a buyer, rather than the government or a competing seller of the tied product, seeks to enforce the same law (Pet. at 25), many of the cases rejecting a separate coercion requirement are cases brought by overcharged buyers. E.g., *Response of Carolina, Inc. v. Leasco Response, Inc.*, supra.

In all the cases cited by petitioners for the existence of an additional coercion requirement as part of a tying violation, the contract at issue simply involved the purchase of two separate products *without* conditioning sale of one product on sale of the other. In these cases the courts,

therefore, required proof of "coerced" purchase of the second product as an alternative means of establishing that purchase of the first was conditioned on purchase of the second. E.g., *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F. 2d 658, 665-66 (2d Cir. 1974);²³ *Response of Carolina, Inc. v. Leasco, Inc.*; *Ungar v. Dunkin' Donuts, Inc.*, supra. In none of these cases did the courts of appeals even in passing define coercion as a separate element of a tying violation additional to the conditioning element. E.g., *Ungar v. Dunkin' Donuts, Inc.*, supra, 531 F. 2d at 1224.²⁴

Hence, there is no conflict among the circuit court cases on tying, as the Court of Appeals below was itself careful to determine (Pet. App. 28-31). Petitioners have created a specious appearance of such conflict by indiscriminate comparison of cases where contractual conditioning was absent, to cases such as the present case in which contractual conditioning is clearly the issue (Pet. App. 26-31; 32-33).²⁵

Since, as the court below recognized, proof of conditioning of the purchase of one product upon another has always sufficed to establish tying, petitioners apparently

23. Petitioners' extensive citation from *Capital Temporaries* (Pet. at 26-27) is inapposite because, while the court there assumed that the contract "obligated the plaintiff to operate both kinds of franchises," (Pet. at 26), it did *not* assume that the contract required operation of one franchise as a *condition* of operation of another. Indeed, it could not have assumed such a condition in the contract, as there was none. See 506 F. 2d at 665, n. 5.

24. Compare Clayton Act § 3, 15 U. S. C. § 14 (prohibiting sale on "condition . . .").

25. Petitioners nowhere seriously dispute the Court of Appeals' basic conclusion that a contractual clause can be demonstrated to be a condition in its practical economic effect even though the language of condition is not explicitly used (Pet. App. 32-33). Petitioners' only argument on this point is to belittle this holding (Pet. at 29), and to urge incorrectly that common terms in their leases do not create a common issue. See p. 26 *infra*.

would contend that the showing of a sale on condition should suddenly be held insufficient to establish a tying violation, and that an involuntary purchase of the tied product must now be shown as well (Pet. at 25, 28). This contention overlooks the economic purposes of the antitrust laws' prohibition against tying, as well as leading decisions of this Court.

Petitioners confuse voluntary purchase of a product with voluntary payment of its price. Their voluntariness contention fails to recognize that even where one person's purchase of a tied good is, in a subjective sense, "voluntary", antitrust injury will still result from payment of the higher price caused by the reduction in competition in the market for the tied good. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 (1977) ("antitrust injury . . . is . . . injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"). The price of the tied good will ordinarily be higher, due to artificially induced demand, so long as there are *any* purchases of it that are involuntary and that would *not* be made in the absence of the tying condition. The "voluntary" purchaser of the tied good, though agreeing to purchase it at the higher price in order to obtain the tying good, is thus denied the lower price that would prevail in the presence of competitor access to the market for the tied good. Cf. *Carpa, Inc. v. Ward Foods, Inc.*, 536 F. 2d 39, 46 (5th Cir. 1976) (essence of tie-in is "burdensome terms" for tied good). One of the fundamental purposes of the antitrust laws' prohibitions against restraints on competition is to give purchasers the lowest possible price levels which free and open competition for sales (here of the tied goods) can foster. *Northern Pac. Ry. Co. v. United States*, 356 U. S.

1, 4 (1959); see F. Scherer, *Industrial Market Structure and Performance* 12-27 (1970).²⁶

The very existence of a tying condition has, in effect, been held by this Court to be conclusive evidence of involuntary purchase, for "[i]f the manufacturer's brand of the tied product is in fact superior to that of competitors the buyer will presumably choose it anyway." *Standard Oil Co. v. United States*, 337 U. S. 293, 306 (1949). Hence the petition offers nothing more than an invitation to reiterate the obvious—an invitation not worthy of this Court's time and effort.

In short, in addition to raising a false spectre of intercircuit and intracircuit conflict, petitioners are now asking this Court to add an element to the tying offense under Section 1 of the Sherman Act which neither this Court, nor any court of appeals, has hitherto identified, which all courts of appeal to have considered the question have rejected, and which, finally, is directly contrary to the policy of the antitrust laws. Petitioners' invitation to this Court to make an unnecessary ruling of law, when the decision below was correct, should be declined.

26. In the instant case an "involuntary" purchase requirement for proof of illegal tying would be especially inappropriate because plaintiffs allege that petitioners' product, gasoline, is a fungible commodity. With fungible goods one supplier's product is, by definition, equivalent to another's and the principal basis for competition among suppliers is the price at which they offer the goods. It defies common sense to contend that under such circumstances a purchaser of gasoline will "voluntarily" buy one supplier's gasoline when another offers a lower price.

In their reply brief in this Court petitioners may dispute respondents' contention that gasoline is a fungible commodity. Cf. Pet. at 16-17 (discussing the merits never reached below). Any such effort to develop the merits of this controversy here can only underline the importance of developing a full factual record before plenary review of the purported "coercion" issue is granted in this Court. A ruling on this issue, without a determination of whether gasoline is a fungible commodity, would seem to be premature.

III.

In Reviewing the Class Action Decision of the District Court the Court of Appeals Applied Existing Criteria for Appellate Review of District Court Class Action Determinations

Petitioners also claim that in reviewing the District Court's class action decision, the Court of Appeals did not give proper weight to the exercise of discretion by the District Court. This claim misreads the Third Circuit's opinion, which merely vacated the District Court's decision and remanded the case for further proceedings in the District Court (Pet. App. 42).²⁷ In holding that the District Court had misidentified the legal issues raised by plaintiffs' complaint (*e.g.*, Pet. App. 32-33), the Court of Appeals carried out the traditional appellate function of overseeing the trial judge's construction and application of the controlling principles of law. Its opinion is actually an admirable effort to guide the District Court in the applicable principles of substantive law which are relevant to the inquiry that must be made under Federal Rule 23(b)(3). Instead of the abuse of appellate power that the petitioners so noisily claim occurred, a fair reading of the opinion below indicates that it is nothing more than the expected guidance offered by an appellate court to the court of first instance (*E.g.*, Pet. App. 36-39).

In correcting the District Court's errors of law without redetermining the class issue, the Court of Appeals applied the standard of review set forth in *Katz v. Carte Blanche Corp.*, 496 F. 2d 747 (3d Cir. 1974) (in banc), *cert. denied*, 419 U. S. 885 (1974) (Pet. App. 25). Peti-

27. Petitioners' assertion that the Court of Appeals made a "de novo class determination" (Pet. at 19) is inaccurate and is flatly contradicted by the Court of Appeals' remand of this litigation for further consideration of the class action issue (Pet. App. at 42).

tioners concede—and even argue—that *Katz* sets forth the correct standard for appellate review of a district court's class action determination (Pet. at 18). In *Katz*, the Third Circuit, speaking through the same judge who joined in the opinion below, held as follows:

"[t]he predominance finding requires at a minimum *the identification of the legal and factual issues, common and diverse, and an identification of the class members to which those relate. We must determine whether the district court has properly identified the factual or legal issues, and has properly identified those which are common.* If the district court has properly identified the issues common and diverse, we would undoubtedly defer in most instances to its conclusion as to predominance, since that requirement relates to the conservation of litigation effort, and the trial court's judgment probably will be as good as ours. If the district court has applied the correct criteria to the facts of the case, then, it is fair to say that we will ordinarily defer to its exercise of discretion. *But if it has not properly identified the issues, and not properly evaluated which are common, the order is not entitled to such deference.*" 496 F. 2d at 756-57 [emphasis supplied].²⁸

The holdings of the Court of Appeals in the instant case are no more than corrections of District Court errors of law or misidentification of common issues, or in one instance of failure to consider the applicable criteria of Rule 23.

28. Petitioners' paraphrase of *Katz* omits the last sentence (Pet. at 19). The quotation from *Katz* in the dissent is similarly selective, even though the dissenting opinion claims otherwise (Pet. App. 49).

For example, in holding that the District Court had erroneously assumed that an additional showing of coercion was an element of a tying violation where a sale on condition was present, the Court of Appeals did no more than hold that the District Court had misidentified the legal elements of a tying violation (Pet. App. 27-31; 32-33). Similarly, in determining that the existence of a *de facto* condition in petitioners' short-term leases was a common question on which respondents could introduce class-wide proof with respect to the lease claim, the Court of Appeals merely "identified [one of] those issues which are common to the class members." (Pet. at 18, paraphrasing *Katz*). This identification of common issues by the Court of Appeals did not at all abridge the District Court's discretion to decide whether these issues, once correctly understood as questions common to all class members' claims, would predominate over individual ones that petitioners might still raise in the District Court on remand (Pet. App. 39). Indeed, the District Court, far from granting a class, has now ordered full briefing of the class action certification issue (R. App. 4A-5A).

Another illustration of the Court of Appeals' measured review of the District Court's class certification decision is the appellate court's treatment of respondents' trademark tying claim. In vacating the District Court's class certification decision, the Court of Appeals did not order the District Court to grant a class on this claim. Rather, it noted that the District Court had failed even to *consider* the relevant legal criterion under Rule 23, *viz.*, Rule 23 (c)(4)(A)'s provision for the maintenance of class actions only as to particular issues (Pet. App. 35). The Court of Appeals simply remanded to the District Court for consideration of separate certification of this claim under Rule 23(c)(4)(A), Fed. R. Civ. P. This is such a perfect example of the Court of Appeals' observance of the *Katz*

standard of appellate review that petitioners are constrained to ignore it altogether in their petition to this Court.

The approach adopted by the Court of Appeals does not conflict with that of other circuits. Petitioners concede that the "principles [of *Katz*] have been adopted by several other circuits." (Pet. at 18) (citations omitted). Therefore, no conflict justifying granting the writ has been shown.²⁹

Petitioners' reliance on the Fourth Circuit's decision in *Windham v. American Brands, Inc.*, 1977-2 Trade Cas. ¶ 61,670 (4th Cir. 1977) (in banc), as raising a conflict actually demonstrates the inappropriateness of certiorari in this instance (Pet. at 23-24). A comparison of the opinions in *Windham* and this case shows quite clearly the case-specific character of the commonality question in antitrust actions, since that case involved three different yet intertwined conspiracy claims, 1977-2 Trade Cas. at pp. 72,746-47, whereas this case involves only one basic claim of combination to restrain trade (via the class-wide tying arrangements). Moreover, in terms of suggesting the process to be followed by the district courts, *Windham* and *Bogosian* are entirely consistent. Whereas the *in banc* court in *Windham* reversed the Fourth Circuit panel for invading the lower court's discretion by *ordering* it to certify a class action, here the Court of Appeals merely *vacated* the incorrect decision of the lower court, and remanded for that court to exercise its own discretion as to manageability and predominance (Pet. App. 39, 42). Furthermore, *Windham* involved an initial improper appellate court redetermination of manageability, an issue uniquely

29. As just discussed, the review given by the Third Circuit to the class action decision of the District Court is entirely in accordance with the principles of *Katz*. It is the selectiveness of petitioners' quotation from *Katz*, see p. 23 *supra*, that allows the claim of a conflict between *Katz* and the Third Circuit's decision here.

appropriate for district court discretion. See *Katz v. Carte Blanche Corp.*, *supra*. In *Bogosian*, the Third Circuit has explicitly left the issue of predominance, and therefore of manageability, see Fed. R. Civ. P. 23(b)(3)(D), open for determination by the District Court (Pet. App. 39, 40).

In disputing the standard of review, petitioners also take issue with the Court of Appeals' identification of the common issues raised by the complaint (Pet. 19-22). As to each of these issues, however, the Court of Appeals was correct in concluding that the issues raised by respondents' tying claims could be treated on a common basis.

First, the Court of Appeals correctly concluded that the existence of over four hundred lease forms did not create individual issues (Pet. App. 34). Petitioners make a general assertion that "many of the provisions are not common to the leases utilized by the defendants" (Pet. at 20). However, it suffices for commonality that the *particular* clauses in question, *e.g.*, the short lease term provision, the leasehold alteration prohibition, and the minimum gasoline purchase provision, be common to the lease forms, and the petition does not challenge this. In effect, the Court of Appeals merely recognized the obvious: that the District Court had erroneously equated the number of linguistic variations in the lease forms with the number of meaningfully different terms therein, and had, therefore, failed to identify the common issues arising from the forms.

Second, the Court of Appeals correctly concluded that the practical economic effect of a short-term lease was a class-wide question. Petitioners assert that "the location of [a] station and its sales volume . . . have a direct impact on the 'practical economic effect' of lease provisions on the individual dealers." (Pet. at 20). However, they ignore the fact that regardless of a lessee-dealer's location or sales volume, their unbridled rights not to renew leases at the end of a year, and to cancel leases immediately

for alteration of the leasehold, will have precisely the same impact on *any* dealers' willingness to sell another supplier's gasoline (which would require leasehold alteration, *inter alia*, Pet. App. 32).

Third, the Court of Appeals correctly held that the existence of market power over the alleged tying good, improved service station sites, presented a common issue on which plaintiffs could seek to introduce common proof. (Pet. App. 35-36). Petitioners, contending that their market power over improved service station sites is not a common question, actually take issue only with an *example* given by the Third Circuit of how plaintiffs might succeed in showing such market power (Pet. at 20-21). However, plaintiffs have alleged and offered to show that such market power does exist on a classwide basis, and defendants are simply trying to have the issue prejudged here by what amounts to advance speculation that plaintiffs will not succeed in making the requisite proof.³⁰

Fourth, petitioners contend that the issue of fact of damage does not present a common question. (Pet. at 21-22). However, the Court of Appeals did not *conclude* that fact of damage was a common question, but simply remanded this issue for the District Court to consider afresh, because "neither the parties nor the district court focused on the issues which would determine whether fact of damage may be proven on a class basis." (Pet. App. 39). Rather than assert that this limited holding invades the District Court's discretion, the petition switches focus

30. Notably, the courts can virtually take judicial notice of the pervasiveness of the market power which petitioners wield in the marketing of gasoline. *E.g.*, *Shell Oil Co. v. Federal Trade Commission*, 360 F. 2d 470, 481 (5th Cir. 1966) (Wisdom, J.), *cert. denied*, 385 U. S. 1002 (1967). The Court of Appeals below, however, refrained from such a ruling of law and merely held that plaintiffs—on whom the burden would still fall to demonstrate market power—could attempt to make such proof on a classwide basis.

to a number of alleged errors in the Court of Appeals' damage formulation which, even if they were errors, have not been held to upset class treatment in the past. See, e.g., *Siegel v. Chicken Delight, Inc.*, 448 F. 2d 43, 52-53 (9th Cir. 1971), *cert. denied*, 405 U. S. 955 (1972). Moreover, these alleged errors in the Court's damage formulation form no part of the question presented for review by petitioners, and cannot even be said to be a subsidiary part thereof.

Petitioners also assert that the Court of Appeals "summarily" disregarded the District Court's superiority analysis (Pet. at 22). However, it is clear that the Court of Appeals examined each reason advanced by the District Court for not finding class treatment superior (Pet. App. 40). Moreover, the District Court's superiority findings must in any event be made anew in light of its misidentification of the elements of a tying violation as including proof of individual coercion. On remand, the District Court may, for example, find a class action more manageable without an individual coercion question being presented as to each class member.³¹

In summary, review in this Court of the class action decision of the District Court would be totally inappropriate. No general proposition of federal practice or procedure is at stake, nor are any conflicts between the circuits framed for review. Issues regarding the existence of common questions under Rule 23(b)(3) are by their very nature dependent entirely on the substantive underpinnings of the particular case before the district court, as the Court of

31. In addition, the Court of Appeals can hardly be said to have invaded any exercise of discretion by the District Court to determine the superiority of a class action when the District Court merely recited the factors enumerated under Rule 23(b)(3) *without any factual showing whatever* that they actually applied in this litigation (Pet. App. 101). Cf. *Kessler v. Hynes & Howes Real Estate, Inc.*, 66 F. R. D. 43, 51 (S. D. Iowa 1975).

Appeals below recognized (Pet. App. 38-39). That is, questions of commonality are *ad hoc*, and the basic issue is whether the district judge employed the appropriate law in identifying these questions, which is all that the Third Circuit explored in this case (Pet. App. 24-42; see *Katz v. Carte Blanche Corp.*, *supra*.)

At best petitioners, through their constant reference to the lack of an in banc hearing which they assume would have been granted, are asking this Court to act as a surrogate for the full Third Circuit Court of Appeals when there was no occasion for in banc review below. Since all other bases for Supreme Court review are absent in this case, respondents submit that this would be an unnecessary use of certiorari jurisdiction.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

Federal Rule of Civil Procedure Rule 8

GENERAL RULES OF PLEADING

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses; Form of Denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does

(1A)

so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to be Concise and Direct; Consistency.*

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the in-

sufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of Pleadings.* All pleadings shall be so construed as to do substantial justice.

IN THE
United States District Court
 FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—
 Civil Action No. 71-1137
 —

PAUL J. BOGOSIAN

v.

GULF OIL CORP., et al.

—
 Civil Action No. 71-2543
 —

LOUIS J. PARISI

v.

GULF OIL CORP., et al.

—
ORDER

AND Now, this 12th day of December, 1977, it is
 ORDERED as follows:

1. In the event the United States Supreme Court has not acted upon defendants' petition for a writ of certiorari to the Court of Appeals for the Third Circuit in *Bogosian v. Gulf Oil Corp.*, 561 F. 2d 434 (3d Cir. 1977), by March 1, 1978, plaintiffs are directed to file with the court on or before March 15, 1978, any briefs or other legal memoranda addressing the issues of class certification and class definition.

Defendants response to plaintiffs' briefs shall be filed with the court within forty-five (45) days after plaintiff's briefs are filed. Either side may file affidavits, exhibits or other legal papers in support of their briefs.

2. In the event the United States Supreme Court denies the petition for writ of certiorari as described above prior to March 3, 1978, plaintiffs shall file any briefs on the class action issues within two weeks after notification of such denial and defendants' responsive briefs shall be filed within forty-five (45) days after plaintiffs' are filed.

3. In the event the United States Supreme Court grants the petition for a writ of certiorari as described above, counsel shall communicate this fact to the court. The court will at that time determine what further proceedings, if any, shall be conducted in the district court.

By THE COURT:

/s/ DONALD W. VANARTSDALEN

J.